NO. 3902

In the United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT

DAVID TAYLOR,

Appellant,

against

NEVADA HUMBOLDT TUNGSTEN MINES COMPANY, a corporation, TUNGSTEN PRODUCTS COMPANY, a corporation, MILL CITY DEVELOPMENT COMPANY, a corporation, W. J. LORING, C. W. POOLE, R. NENZEL, H. J. MURRISH, L. A. FRIEDMAN, C. H. JONES, G. K. HINCH, J. T. GOODIN, V. A. TWIGG, J. C. HUNTINGTON, and LENA J. FRIEDMAN, individually,

Appellees.

Appellant's Opening Brief

GEORGE B. THATCHER,
WILLIAM WOODBURN,
JOHN G. JACKSON,
Attorneys for Appellant.

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Appellees.

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

This is an appeal by the plaintiff (p. 1466) from a judgment and decree of the District Court of the United States in and for the District of Nevada, filed September 13, 1921 (p. 1437) dismissing the complaint of the plaintiff. This action is in equity and was brought by the plaintiff to compel the specific performance of certain contracts and the delivery of stock in the defendant companies, set forth and referred to in the bill of complaint and for such other and further relief as might be just and equitable (pp. 1145-

1147). It was commenced on the 17th day of April, 1920, and came on for trial on September 14, 1920, before the Hon. E. S. Farrington. The trial, at which considerable evidence was introduced and testimony taken, lasted over a week, and after the conclusion thereof the Trial Court held the case under advisement, until August 10th, 1921, when it handed down its opinion and rendered a decision in favor of the defendant (pp. 1407-1436), which is the subject of this appeal. Thereafter, on September 30th, 1921, the plaintiff filed a petition for rehearing (p. 1440) which petition was on November 8, 1921, by order of said Court, denied.

The complaint, (p. 1125) after alleging the usual jurisdictional grounds, alleges in substance that on January 16, 1919, the plaintiff Taylor and the two defendants, Nevada Humboldt Tungsten Mines Company, hereinafter referred to as the "Tungsten Company," and the Tungsten Products Company, hereinafter referred to as the "Products Company," entered into a contract, a copy of which is attached to the complaint and marked "Exhibit A" (p. 1148) under and by the terms of which Taylor agreed to advance $100,000, and the two companies agreed to deliver to him at specified dates 170 tons of scheelite concentrates of certain guaranteed qualities; that on the same day, in consideration of the plaintiff entering into the agreement with the Tungsten Company and Products Company, and for other considerations, the defendants Friedman, Poole, Nenzel, Jones, Murrish, Hinch, Huntington, Goodin, Twigg and Lena Friedman also entered into an agreement with the plaintiff Taylor, a copy of which is attached to the bill of complaint and marked "Exhibit B" (p. 1153) under and by the terms of which these individual defendants granted to the plaintiff Taylor an option on all their interest in the three defendant corporations for a

total purchase price of $498,000, agreeing that all debts and obligations of the said companies should be satisfied out of the purchase money and that the option should be good up to and including the 16th day of July, 1919. That shortly after the making and execution of the contract of January 16th (Exhibit B), one Howland Bancroft, a mining engineer, at the special instance and request of the plaintiff, made an examination of the mines, mining property and mining rights of the Tungsten Company, which said report was communicated to the plaintiff; that said report showed the amount of development which then existed upon said mining property and showed that about 9,000 tons of scheelite ore of an average of 1.75 per cent tungstic acid had been developed, placed in sight, blocked out and made ready for mining in said mining property; that the fact and truth concerning said mines and mining claims of the Nevada Humboldt Tungsten Mines Company and the development work which had been performed and the new development work in progress on and within said mines, mining claims and mining rights of said Nevada Humboldt Tungsten Mines Company, and the amount of ore developed, placed in sight, blocked out and made ready for mining and extraction and reduction in said mining property of the Nevada Humboldt Tungsten Mines Company were, at all times mentioned in the complaint, peculiarly within the knowledge and information of the individual defendants (except Loring) and particularly of the defendants Poole, Nenzel, Murrish and L. A. Friedman. That on or about the month of March, 1919, plaintiff informed the individual defendants (except Loring) that it was probable that the plaintiff would not be able to exercise his option to purchase said interests of the defendants (except Loring) in said corporations under said contract of January 16th; that thereupon the defendants Poole, Murrish, Nenzel and Friedman, acting for themselves and the other individual

defendants, with the intent to deceive plaintiff and for the purpose of inducing plaintiff to execute and undertake a supplemental contract, referred to in said bill of complaint, falsely and fraudulently by means of telegrams and letters informed plaintiff that further and new development work had been carried on within said mines, mining claims and mining rights of the Nevada Humboldt Tungsten Mines Company, which had developed and placed in sight, blocked out and made ready for mining, large quantities of scheelite ore of commercial value and capable of being concentrated and the concentrates so returned being of great value; that thereafter and on or about the 2nd day of April, 1919, the defendants Poole, Murrish and Nenzel came to Denver, Colorado, where the plaintiff resided, for the purpose of inducing the plaintiff to make a supplemental contract for the disposition of their respective interests, or part thereof, and the plaintiff then and there believing and relying on the said representations of the defendants Poole, Murrish and Nenzel, who then and there represented themselves and were acting as the agents and attorneys—in fact for the other defendants (except Loring), entered into a supplemental contract whereby plaintiff undertook to raise by borrowing sufficient moneys to pay the debts and obligations of the Nevada Humboldt Tungsten Mines Company, Tungsten Products Company, and their respective shares in the Mill City Development Company, for which said services the plaintiff was to receive 62 per cent of the issued capital stock of the Nevada Humboldt Tungsten Mines Company, 62 per cent of the issued capital stock of the Tungsten Products Company, and 62 per cent of one-half of the issued capital stock of the Mill City Development Company, a copy of which contract is attached to and made a part of the bill of complaint, marked "Exhibit C", and is as follows:

"THIS AGREEMENT this day entered into between David Taylor, of Denver, Colorado, first party, and L. A. Friedman, Lena J. Friedman, C. W. Poole, John G. Huntington, R. Nenzel, C. H. Jones, G. K. Hinch, J. T. Goodin, V. A. Twigg and H. J. Murrish, second party,

WITNESSETH:

WHEREAS the parties hereto, on or about January 16, 1919, entered into an agreement in respect to the purchase and sale of certain stock of the Nevada Humboldt Tungsten Mines Company, the Tungsten Products Company and the Mill City Development Company, reference to which contract is hereby made and which said contract is made a part hereof, and

WHEREAS the Nevada Humboldt Tungsten Mines Company on the same date, entered into an agreement with the said David Taylor for the advance of certain moneys on scheelite concentrates, as more particularly appears in said agreement to which reference is hereby made, and

WHEREAS this agreement is supplemental to both of said agreements and all of said agreements are now to be read together and considered as one in so far as applicable, due reference being had to the changes herein made, and

WHEREAS, owing to the demoralization of the Tungsten market it seems impossible for the said David Taylor to market scheelite concentrates or to interest parties in the purchase of tungsten properties, and for that reason it is deemed probable that said Taylor will not be able to exercise his option contained in the above mentioned agreement, and

WHEREAS, by reason of the facts herein named it may become impossible for the Nevada Humboldt Tungsten Mines Company and the other Companies above referred to to secure sufficient funds for the liquidation of their indebtedness, and

WHEREAS it is the purpose of this agreement to so modify the said option as to enable the said Nevada Humboldt Tungsten Mines Company and its allied companies to pay its debts, continue its operation and secure itself from the jeopardy of possible loss through suits by its creditors,

NOW, THEREFORE, in consideration of the premises and of the sum of One Dollar ($1.00) each to the other in hand paid, it is mutually understood, covenanted and agreed as follows, to-wit:

1. The first party undertakes to secure by borrowing for the Nevada Humboldt Tungsten Mines Company, and its allied companies, a sum sufficient to liquidate the indebtedness of the Nevada Humboldt Tungsten Mines Company, the Tungsten Products Company, and the proportion of the indebtedness of the Mill City Development Company which the second parties owe, said indebtedness estimated to be the sum of Two Hundred and Twenty Thousand ($220,000.00) Dollars, on or before June 16, 1919.

2. When or if the said first party shall secure the said sum sufficient to liquidate the entire indebtedness, as above provided, then and in such event the second parties promise, covenant and agree to transfer and deliver to the first party in full payment for services rendered in securing such sum of money, 62 per cent of the issued capital stock of the Nevada Humboldt Tungsten Mines Company, 62 per cent of the issued

capital stock of the Tungsten Products Company, 62 per cent of one-half of the issued capital stock of the Mill City Development Company; that a deposit of the amount necessary to liquidate the indebtedness as herein provided, in the Wells Fargo Nevada National Bank, shall be sufficient evidence of the performance of the conditions herein for the transfer and delivery of the stock as herein provided.

IT IS MUTUALLY UNDERSTOOD AND AGREED:

A. That the said sum raised by the first party herein is a loan to the Nevada Humboldt Tungsten Mines Company, the Tungsten Products Company and the Mill City Development Company, and not a payment for stock; and that same is to be evidenced by the issuance of redeemable preferred stock with a maximum of 7 per cent cumulative interest, provided that said stock shall be sold for less than 95 per cent of par net to the company.

B. That the second parties hereto will cause a new company to be organized to which the assets of the companies herein described shall be conveyed or shall amend the present articles of the Nevada Humboldt Tungsten Mines Company and its allied companies hereinbefore mentioned, in order to effectuate this agreement as shall be required by the first party.

C. It is agreed that in such incorporation, or in the amendment above provided, due and proper provision shall be made (1) that 80 per cent of the Board of Directors must approve the sale of any of the property of the company or the purchaser of additional property

(2) that the cumulative voting power of the common stock shall not be taken away; (3) that the net receipts from any relief received from the United States Government under the War Minerals Relief Act of the corporations herein mentioned or any of them, shall inure to the benefit of such new corporation as may be formed; (4) that profits shall be distributed whenever same have accumulated to the amount of Fifty Thousand ($50,000.00) Dollars or over, after the debts are paid, unless contrary provided by a vote of 80 per cent of the Directors; (5) and further, that the preferred stock shall be redeemed out of the profits on June 30 or December 31, of every year, whenever the sum of Fifty Thousand ($50,000.00) Dollars is accumulated, and before any dividends are paid on the common stock.

D. IT IS FURTHER MUTUALLY UNDERSTOOD AND AGREED that the performance of this agreement shall release the first party from any and all obligation to pay the purchase price of said stock mentioned in the option hereinbefore referred to.

E. IT IS FURTHER MUTUALLY COVENANTED AND AGREED that this agreement shall expire by limitation on June 16, 1919, and shall carry with it the option hereinbefore mentioned as executed on January 16, 1919, which shall also expire by limitation on said date, and they shall be of no further force or effect if the first party shall not have negotiated the loan and secured the money provided in Paragraph 1 hereof.

Time is the essence of this agreement, and each and every clause hereof shall bind and benefit the heirs and assigns of the respective parties hereto.

IN WITNESS WHEREOF the parties hereto have

hereunto set their hands and seals this 2nd day of April, 1919.

(Signed) DAVID TAYLOR,
First Party.
C. W. POOLE
R. NENZEL,
H. J. MURRISH,

(L. A. FRIEDMAN,
(LENA J. FRIEDMAN,
(C. H. JONES,
(G. K. HINCH,
(J. T. GOODIN,
By R. NENZEL,
Attorney in Fact.
(V. A. TWIGG,
(J. G. HUNTINGTON,
Second Parties.
C. W. POOLE,
Attorney in Fact."

That defendants Poole, Murrish and Nenzel, acting for themselves and as the agents of and the attorneys-in-fact for the other individual defendants (except Loring) for the purpose of inducing the plaintiff to enter in and upon said supplemental contract of date of April 2, 1919, then and there falsely and fraudulently and with the intent to deceive the plaintiff, represented to the plaintiff that since the examination of the mines, mining claims and mining rights of the Nevada Humboldt Tungsten Mines Company, and the report thereof made by Howland Bancroft, mining engineer, aforesaid, to the plaintiff, great and additional ore bodies of equal grade and quality had been developed; that a large quantity of new development work had been done and performed upon said mines and that there was then on said 2nd day of April, blocked out, in sight and ready for mining and reduction into concentrates, over

60,000 tons of scheelite ore which would carry an average of 1.75 per cent tungstic acid; that each and all of the representations aforesaid were false and untrue and were known by said defendants at the time they were made to be false and untrue and were made for the purpose of deceiving the plaintiff and for the purpose of causing him to undertake and carry out the terms of said supplemental contract of April 2nd; that in truth and in fact at said time there was opened up, blocked out and in sight in said mine not to exceed 19,000 tons of scheelite ore of an average value not to exceed 1.75 per cent tungstic acid; that plaintiff, then and at all times thereafter, relying upon and believing the said false and fraudulent representations of said defendants so made as aforesaid, executed said contract of said date of April 2, 1919, and immediately thereafter gave practically his entire time and attention to carrying out the terms of said contract by which he was to raise, for the benefit of such defendant corporations, sufficient moneys for the payment of their debts and outstanding obligations, for the purpose of consummating the same and carrying out the terms thereof, paid out and expended in various ways a large amount of moneys in excess of $8,000. That plaintiff, relying upon said representations aforesaid, also gave his time and efforts to said enterprise and the consummation of said contract during all of the time from April 2nd to June 1st, 1919; that as a result of the expenditures aforesaid, time and efforts of the plaintiff, plaintiff succeeded and had pledged himself and others associated with him an amount sufficient to meet any and all obligations of his under the terms of said contract and sufficient to entitle him to receive the 62 per cent of the capital stock of the Nevada Humboldt Tungsten Mines Company, 62 per cent of the stock of the Tungsten Products Company, and 62 per cent of one-half of the stock of the Mill City Development Company, under the terms of said contract of April 2, 1919; that said sum was pledged by the

plaintiff and others associated with him in the amount aforesaid, relying upon the representations of the individual defendants (except Loring) and the plaintiff communicated said representations to his associates, who pledged a large and substantial portion of said money to the plaintiff for the purpose of carrying out any and all his obligations under the terms of said contract; that plaintiff on or about between the 18th and 25th days of May informed the individual defendants (except Loring) that he was ready, able and willing to perform his obligations under the terms of said contract; that on or about the 1st day of June, 1919, plaintiff discovered the falsity of the representations of said defendants and upon receipt of such information communicated the same to his associates who had agreed to furnish a large portion of the money necessary for the completion of the obligations of the plaintiff under the terms of said contract of April 2nd; that thereupon his associates withdrew from said undertaking and refused to go into the same and refused to advance any money whatsoever for it; that by the terms of said contract of April 2nd, 1919, the individual defendants (except Loring) covenanted and agreed that such moneys as should be received by the plaintiff should be a loan to the defendants Nevada Humboldt Tungsten Mines Company, the Tungsten Products Company, and the Mill City Development Company, and not in payment for stock, and that said loan was to be evidenced by the issuance of redeemable preferred stock, and that the defendants would cause a new company to be organized to which the assets of said defendant corporation would be conveyed or to so amend the Articles of the Nevada Humboldt Tungsten Mines Company as to effectuate this agreement as should be required by the plaintiff; that plaintiff before the expiration of said contract requested and demanded of said defendants (except Loring) that they so organize said new corporation or amend the Articles of Incorporation of said company to

comply with the provisions of the contract of April 2nd; that the defendants wholly neglected and refused to perform said contract of April 2nd, 1919, and refused and neglected to deliver to the plaintiff 62 per cent of the stock of the Nevada Humboldt Tungsten Mines Company, 62 per cent of the stock of the Tungsten Products Company, and 62 per cent of one-half of the stock of the Mill City Development Company under the terms of said contract of April 2nd, 1919; that the plaintiff performed each and every covenant and obligation and agreement in said contract by him to be kept and performed; that said stock of said defendant corporation at and before the commencement of this suit had no market value and that the value thereof at the time the contract was made and entered into between the plaintiff and said defendants depended upon the operation and development of the property owned by the Nevada Humboldt Tungsten Mines Company, and particularly the mines and mining property thereof; that the value of said stock cannot be exactly shown or definitely ascertained and that the continued development of said property, mines and mining claims would increase the value of said property and the value of said stock; that there is no method of ascertaining the amount or damage the plaintiff has or will sustain by reason of the failure on the part of said defendants to transfer and deliver to said plaintiff the amount of stock to which he is entitled under said contract; that the value of said stock is wholly conjecture, speculative and uncertain and dependent upon many and varied conditions wholly beyond the control of either the plaintiff or defendants; that on or about the 16th day of August, 1918, the defendant Nevada Humboldt Tungsten Mines Company and its subsidiary, the defendant, Tungsten Products Company, entered into a contract with the defendant W. J. Loring for the sale of all its mines, mining property and mining claims and particularly of its

assets of every kind and character; that said contract was made and executed pursuant to resolution of the Board of Directors of said corporations and that thereafter said defendant corporations called meetings of their respective stockholders for the purpose of ratifying and confirming said contract with said Loring; that said meetings of stockholders were held without adequate or proper notice thereof to the stockholders of said corporations, and particularly to the plaintiff, a stockholder of the Nevada Humboldt Tungsten Mines Company; that said meetings were held without giving notice, as required by the laws of the State of Nevada; that the plaintiff objected to said sale and to said contract and promptly demanded the rescission and cancellation thereof; that thereafter the officers, directors and stockholders of said corporation refused and neglected to set aside or cancel said pretended conveyances and said contracts or to commence any action in any Court for the rescission or cancellation thereof; that thereupon this plaintiff commenced an action in said District Court as a stockholder to set aside, cancel and rescind said contracts and said conveyances so unlawfully made by said corporations to said defendant Loring; that said Loring took said deeds and said contract for said property from said defendant corporations with full notice of the rights and equities of the plaintiff, and said Loring was duly and regularly informed thereof by the plaintiff before he had in any wise performed any part or portion of said contracts; that said suit for the cancellation and rescission of said contract and said conveyances to said Loring by the defendant corporations is now pending in said District Court; that the Nevada Humboldt Tungsten Mines Company had called another meeting of stockholders to be held on April 19th to further authorize and ratify the sale of the property of the defendant corporations to the defendant Loring and authorize instrument of conveyance to said Loring by said de-

fendant corporations of all of the property and assets of Nevada Humboldt Tungsten Mines Company and the Tungsten Products Company; that the plaintiff was informed and believed that the defendants Nenzel, Poole, Murrish, Friedman, Jones, Hinch, Goodin, Twigg, Huntington and Lena J. Friedman, as stockholders of said Nevada Humboldt Tungsten Mines Company and said Tungsten Products Company, and the Mill City Development Company would at such meeting vote all their shares, which would include the 62 per cent of the capital stock of the Nevada Humboldt Tungsten Mines Company, 62 per cent of the capital stock of the Tungsten Products Company, and 62 per cent of one-half of the capital stock of the Mill City Development Company, all of which is rightfully the property of the plaintiff, in favor of authorizing the sale to Loring of all of the corporate property and assets of said defendant corporations, all of which would result in great irreparable damage and injury to the plaintiff, unless restrained by order of the Court; that the effect of said sale of said property of said corporations would be practically to dissolve the same and that unless restrained by said Court the proceeds of said sales would be distributed to the stockholders, all of which would be to the great and irreparable damage of the plaintiff and would greatly depreciate the value of the stock to which plaintiff is entitled under the terms of said contract of April 2nd, 1919; that on or about the 1st day of June, 1919, the plaintiff duly offered to perform each and every covenant and obligation on his part to be performed under and by virtue of said contracts of January 16th and April 2nd aforesaid, provided that the said defendants would grant and allow to the plaintiff an abatement of certain terms thereof for and on account of the false and fraudulent representations alleged.

Plaintiff in and by its said complaint prayed for a judgment and decree decreeing that the defendants Poole, Nen-

zel, Murrish, L. A. Friedman, Jones, Hinch, Goodin, Twigg, Huntington and Lena J. Friedman, be compelled to specifically perform their said contracts and deliver to the plaintiff 62 per cent of the stock of the Nevada Humboldt Tungsten Mines Company, 62 per cent of the stock of the Tungsten Products Company, and 62 per cent of one-half of the stock of the Mill City Development Company; that plaintiff have an abatement of the provisions of said contract, or of the whole thereof, for and on account of the false and fraudulent representations of the defendant, as should be determined by the Court to be just and equitable; that the defendants Poole, Nenzel, Murrish, L. A. Friedman, Jones, Hinch, Goodin, Huntington and Lena J. Friedman as stockholders be enjoined **pendente lite** from voting 62 per cent of the stock of the Nevada Humboldt Tungsten Mines Company, 62 per cent of the stock of the Tungsten Products Company, and 62 per cent of one-half of the stock of the Mill City Development Company, at the special meeting of the stockholders, to be held at Lovelock, Nevada, on the 19th day of April, 1920, or of any continuance of said meeting or of any other meeting of the stockholders until further order of said Court, in favor of furthering or at all ratifying, confirming or approving or in any wise authorizing the sale and conveyance of the assets of the mines and mining claims of the defendant, Nevada Humboldt Tungsten Mines Company, to Loring, or to any person or persons whomsoever, and enjoining **pendente lite** said defendants, their agents or attorneys from in any wise authorizing the execution or delivery of any bills of sale, deeds or other instruments of conveyance, which would convey or further assure to said Loring title of, in or to any of the property, mines or mining claims or assets of the Nevada Humboldt Tungsten Mines Company, and for an order enjoining the defendant corporations and their officers, agents and attorneys, or their directors or any other persons acting under or through them from per-

mitting to be voted at said special meeting of stockholders or at any continuation thereof or at any other meeting of stockholders until the further order of this Court, said 62 per cent of the stock of the Nevada Humboldt Tungsten Mines Company, 62 per cent of the stock of the Tungsten Products Company, and 62 per cent of one-half of the stock of the Mill City Development Company, in favor of ratifying or confirming any instrument or contract for the sale of the property and assets of the defendant corporation, Nevada Humboldt Tungsten Mines Company, or from executing any bills of sale or other instrument of sale of the said Nevada Humboldt Tungsten Mines Company to said Loring or any person or persons whomsoever, until further order of said Court; that said injunctions upon final hearing be made perpetual; that plaintiff have judgment for his costs and that plaintiff have such other and further relief as might be just and equitable int the premises.

The Trial Court in its opinion (p. 1435) decided that the Plaintiff Taylor was neither misled nor deceived by the defendants and found that the evidence was not sufficient to show that the alleged false representation as to tonnage in the mine were made; and that even if there were such representations the plaintiff Taylor was not thereby induced to enter into the contract of April 2nd or to attempt the performance of its conditions; that the contract of April 2nd, as well as the option of January 16, expired by limitation June 16, 1919, and that prior to that date no deposit in the Wells Fargo Nevada National Bank of San Francisco of an amount sufficient to liquidate the indebtedness of the defendant corporations was made by or for Taylor; that he never performed what he agreed in the contract to do; that he never made an unconditional offer of performance and never prior to June 16th was he actually ready, able and willing to perform unconditionally. The Court further states in its opinion (p. 1436) that "it is un-

necessary in view of the conclusions reached on the merits of the case to determine other issues raised by the pleadings," and directed that a decree be entered in favor of defendants in accordance with the opinion. In the decree entered pursuant thereto and from which this appeal is prosecuted, it was ordered, adjudged and decreed that the plaintiff take nothing by his bill and that the same be and it thereby was dismissed with costs. The plaintiff in its petition for rehearing stated as ground therefor that the evidence was insufficient to justify said decision and the decree entered pursuant thereto and that said decision and decree entered pursuant thereto were against law, and, as a further ground, that errors at law occurred during the trial, excepted to by the plaintiff.

The plaintiff filed the following assignment of errors, upon which he relies in the prosecution of this appeal from the said decree entered on the 13th day of September, 1921 (p. 1469-1472):

ASSIGNMENTS OF ERROR

I.

That the Court erred in making and entering its final decree in favor of the defendants and against the plaintiff and that said decree is not supported by and is contrary to the evidence, and is against law.

II.

That the Court erred in failing and refusing to enter a decree in favor of the plaintiff, awarding to the plaintiff sixty-two per cent (62 per cent) of the stock of the Nevada Humboldt Tungsten Mines Company, sixty-two per cent (62 per cent) of the stock of the Tungsten Products Company and sixty-two per cent (62 per cent) of one-half of the stock of the Mill City Development Company, and the finding of the Court and the decree entered pursuant

thereto against the plaintiff and in favor of the defendants is contrary to the evidence and not supported thereby, and is against law.

III.

That the Court erred in finding that the plaintiff had failed to establish by a fair preponderance of the evidence, that the defendants, Poole, Murrish, Nenzel and Friedman, for the purpose of inducing plaintiff to undertake the contract, had falsely and fraudulently, by means of telegrams and letters, informed plaintiff that further and new development had been carried on within the mines and mining claims of the Nevada Humboldt Tungsten Mines Company which had developed and placed in sight, blocked out and made ready for mining, large quantities of scheelite ore of commercial value and capable of being concentrated, the concentrates so returned being of great value.

IV.

That the Court erred in finding that the representations made by the defendants through Nenzel, by telegrams of date of February 14, 1919 (Exhibit 2), of February 24, 1919 (Exhibit 3), telegram of Nenzel of March 12, 1919 (Exhibit 8), letter of Nenzel of March 21, 1919 (Exhibit 9), telegram of Friedman of March 25, 1919 (Exhibit 10), letter of Nenzel of March 27, 1919 (Exhibit 13), were true and that by said telegrams or letters or any of the letters or telegrams made prior to the execution of the contract of April 2, 1919 (Exhibit 16) the plaintiff was not misled and said finding was contrary to the evidence and is not supported by the evidence, and is against law.

V.

That the Court erred in finding that plaintiff had failed

to establish by a fair preponderance of the evidence that Poole, Murrish or Nenzel, had, at Denver, falsely and fraudulently represented to plaintiff that since the examination of the mining claims of the Nevada Humboldt Tungsten Mines Company by Bancroft in January, additional ore had been blocked out and there had been made ready for mining over sixty thousand (60,000) tons of scheelite ore carrying an average of one hundred and seventy-five per cent (175 per cent) tungstic acid and in finding that plaintiff was not misled or deceived by the defendants, and the same is contrary to the evidence and is not supported by the evidence and is against law.

VI.

That the Court erred in making the following finding: "I find the evidence is not sufficient to show that the alleged false representations as to tonnage in the mine were made; and even if there were such representations, Taylor was not thereby induced to enter into the contract of April 2nd or to attempt to perform its conditions." Said finding is contrary to the evidence and is not supported by the evidence, and is against law.

VII.

That the Court erred in its opinion and decision filed October 10, 1921 and the findings therein and in the whole thereof and in the conclusions therefrom, and that said opinion upon which the decree was entered is contrary to the evidence and is not supported by the evidence, and is against law.

VIII.

That the Court erred in overruling and denying plaintiff's petition for rehearing.

IX.

That the Court erred in finding that plaintiff had not acted and relied upon the representations made by the defendants and said finding is contrary to the evidence and is not supported by the evidence, and is against law.

ARGUMENT AND BRIEF

As pointed out by the Trial Court, in its opinion, (p. 1423) the plaintiff's "whole case rests on the truth of his allegations that false and fraudulent statements were made to him, and that he relied on them to his prejudice." These question of fact the plaintiff in order to establish his case was required to prove by a fair preponderance of the evidence. The judgment of the Trial Court is that he has failed to do so (p. 1423) and the plaintiff now comes before this Court, taking issue with the Trial Court, on these questions of fact, and contending that these facts were established and proven upon the trial by a fair preponderance of the evidence. There are two charges of misrepresentation alleged in the complaint (pp. 1131-1133) which the plaintifl alleges induced him to execute and undertake the performance of the contract of April 2nd, and which form the basis of this action. These are fairly stated and referred to in the opinion of the Trial Court as follows:

(p. 1423)

> "The first charge of misrepresentation is as follows: Poole, Murrish, Nenzel and Friedman, for the purpose of inducing plaintiff to undertake the contract of April 2nd,
>
> > 'Falsely and fraudulently and by means of telegrams and letters informed plaintiff that further and new development work had been carried on within said mines, mining claims and mining rights of the Nevada Humboldt Tungsten Mines Company, which had developed and placed in sight,

> blocked out and made ready for mining, large quantities of scheelite ore of commercial value, and capable of being concentrated, and the concentrates so returned being of great value.' "

* * * * *

(p. 1428)

> "The second charge of misrepresentation is that Poole, Murrish and Nenzel, at Denver, falsely and fraudulently represented to Taylor that since the examination of the mining claim by Bancroft in January, additional ore bodies had been developed, and that there was then blocked out, in sight and ready for mining over 60,000 tons of scheelite ore which would carry an average of 1.75 per cent tungstic acid; that such representations were false, made for the purpose of inducing him to undertake and carry out the terms of the agreement of April 2nd, and were relied on by him to his prejudice."

FIRST CHARGE OF MISREPRESENTATIONS

As to the first charge of misrepresentations, the Trial Court in its opinion (pp. 1423-1428) compares some of the representations in the letters and telegrams with the facts established by Bancroft's second report, and then concludes (p. 1428):

> "In view of this correspondence and Bancroft's second report, it is impossible to find that the letters and telegrams in evidence from defendants to Taylor prior to April 2, 1919, contained fraudulent mis-statements or that by anything in such letters and telegrams Taylor was misled."

Assignments of Errors III and IV (p. 1470) set forth that the Court erred in making such findings.

The plaintiff testifies (p. 26) that after he had entered

into the contract and option of January 16th he engaged Mr. Howland Bancroft, a mining engineer, to examine the mine and received his report on or about February 20th following, having been informed by Mr. Bancroft by telegram, letter or otherwise as to the general contents of the report a day or two previous. This report (Plffs. Ex. 15, p. 1476) disclosed 8,111 tons of ore, which was commercial, with tungsten selling at $6.00 a unit, and that the average tenor of this ore was 1.75 per cent tungsten trioxide. This is found to be a fact by the Court in its opinion (p. 1423) and is not disputed. On February 24, 1919, the plaintiff wrote Mr. Nenzel, (Plffs. Ex. 1, p. 779) advising him that he did not believe there was the remotest chance of interesting anybody in the purchase of the property at the half million dollar price and suggested a modification of the option. On February 14, 1919, after examination of the mine had been made by Mr. Bancroft, Mr. Nenzel wrote a letter (Plffs. Ex. 2, p. 781) to the plaintiff in which he stated:

> "I might add that the conditions at the mine are exceptionally bright. On the No. 2 South workings we have opened up an ore body which is over 15 feet wide, and a good grade of ore. On the No. 1 South we encountered a dyke sometime ago and which cut off the ore. Yesterday we drove through the dyke and relocated the ore, which is of a good grade, but as yet insufficient work has been accomplished to determine the extent of the ore body."

On February 24th Mr. Nenzel wrote to the Consolidated Ores Company (Plffs. Ex. 3, p. 783) which was owned and controlled by the plaintiff, as follows:

"As per my letter of recent date, I hereby wish to give the information of the telegram I sent to Captain Taylor at New York yesterday:

'The number one drift South is eighty-five feet beyond Granite Dyke Ore low grade Stop Drift number one sixty feet beyond Bancroft sampling Stop Number Two So. tunnel sixty feet beyond Bancroft sampling. Value of ore one and one-half per cent Stop Number two North two hundred seventy-five feet from shaft average width of vein nine feet ore milling one per cent Stop Number two South one hundred feet beyond Bancroft sampling average width of vein four and one-half feet value of ore one-half of one per cent. Number three North drift sixty feet from shaft vein ten feet wide value of ore one and one-half per cent. Number three South fifty-five feet from shaft five feet wide one per cent ore Stop Main working shaft has been advanced twenty-four feet all in good ore contract made yesterday to sink ninety feet next thirty days Mine in much better condition than when Bancroft last sampled same.' "

On March 7, the plaintiff wrote the Tungsten Company (Plaintiff's Exhibit 4, p. 785):

"The results of development work in the mine, **as recently reported, are certainly most gratifying and if they continue as well I think there is a chance that by the beginning of April I may be able to persuade some New York people to advance the necessary money to clean up all the company's indebtedness in return for some modified form of option.**"

On March 10th Mr. Nenzel wrote the plaintiff (Plaintiff's Exhibit 6, pp. 788-789):

"The main shaft has been sunk to a depth of 60 feet since our telegram to you giving the new development work and we are glad to inform you that we have encountered some very rich ore. The ore contains so much scheelite that we are unable to handle more than 40 tons per hour in the mill, when working on ore taken from the shaft. How long this will continue we do not know, but it certainly looks very encouraging. Another encouraging feature of the new development is that the ore does not contain nearly as much sulphides as it did between the second and third levels and from the present indications it would appear as though we are penetrating an oxidized zone."

Mr. Nenzel again wrote to the plaintiff on March 21st, 1919 (Plaintiff's Exhibit 9, p. 795):

"The mine is looking better than ever. We started cutting the station on the fourth level and we will drift 20 feet each way at this point and then continue the shaft on down. The ore for the past thirty feet has been of an exceptionally high grade character."

On March 25, 1919, the defendant, L. A. Friedman, wired the plaintiff from Denver (Plaintiff's Exhibit 10, p. 796):

"Suggest that you and Bancroft come here sometime this week. All stockholders are here now and am sure you will find mine development fulfilling your most sanguine expectation and am confident that we could arrive at some modified arrangement as suggested in your correspondence."

The plaintiff in his letter (Plaintiff's Exhibit 12, p. 798) of March 25th to the defendant L. A. Friedman as President of the Tungsten Company in response to said telegram stated:

"I suggest that Poole come to Denver during the first week in April bringing **exact data as to development work, assays, etc.,** so that he and Bancroft together can work up a **definite tonnage statement of present ore developed.**"

On March 27, 1919, Mr. Nenzel wrote to plaintiff (Plaintiff's Exhibit 13, pp. 801-802):

"Owing to the consolidation of the Rochester properties, now under way at Rochester, Mr. Poole as well as his engineering force, has been rather busy and **no accurate survey of mine development** has been made since Mr. Bancroft was out here. We, however, **expect to have our engineer out there within a week or so to check up the development work and no doubt you will receive a report noting the changes that have been made since Mr. Bancroft completed his work of examination.**

I might add that the fourth level has been cut and in drifting North the vein is seven feet wide and in drifting South the vein is ten feet wide, all in exceptionally high grade ore. It will probably take us two or three days to put up a raise from the 350 to the 300 foot level in order to put in another pocket so we can have a larger pocket capacity in the mine and then we will again continue the sinking of the main shaft to the 500 foot level."

The foregoing documentary evidence which stands unchallenged conclusively proves that the defendants made the representations as alleged in the complaint, to-wit:

"By means of telegrams and letters informed plaintiff that further and new development work had been carried on within said mines, mining claims and mining rights of the Nevada Humboldt Tungsten Mines Company, which had developed and placed in sight, blocked out and made ready for mining, large quantities of scheelite ore of commercial value and capable of being concentrated and the concentrates so returned being of great value."

They are not expressions of opinion; they are not estimates; they are not guesswork on the part of the senders of the telegrams and letters, but positive representations of existing facts, positive statements of further and new development work which had developed and placed in sight large quantities of scheelite ore of commercial value.

The complaint (p. 1131) alleges that these representations were false. The Court, as above stated, has found these representations to be substantially true and the question of whether the Court erred in making such findings comes now before this Court for determination.

The Trial Court, in arriving at its conclusion, starts out in its opinion (p. 1424) by referring to the letter which Nenzel wrote Taylor February 14th (Plff's Ex. 2, 781). The Court says:

> "February 14th Nenzel wrote Taylor that conditions at the mine were exceptionally bright. 'On the number 2 South workings we have opened up an ore body which is over 15 feet wide and a good grade of ore. On the number 1 South * * Yesterday * * * we relocated the ore, which is of a good grade.' (Exhibit 2)."

No comment is made by the Court with reference to these representations, although it appears from Plate No. 5A (Plff's Ex. 20, p. 1507) attached to Bancroft's supplemental report dated June 2nd, 1919, (Plff's Ex. 19, p. 824) which report the defendants concede to be true, that these representations were not true, and that there was no ore body 15 feet in width of a good grade of ore.

The Court goes on and says:

"Ten days later, February 24th, Nenzel wired Taylor," and after quoting the telegrams from Nenzel to Taylor of February 24th (Plff's Ex. 3, p. 783), proceeds to make a test as to the correctness of the representations therein con-

tained by comparing same with the figures and assays shown on Plate No. 5A (Plff's Ex. 20) attached to Bancroft's Supplemental Report (Plff's Ex. 19). For convenience sake the Court divided the statements contained in the telegrams into six items. These representations contained in the telegram and the observations of the Court regarding same are as follows:

ITEM I:

"The number one drift South is 85 feet beyond Granite Dyke. Ore low grade."

This item the Court found to be correct (p. 1425). Bancroft's report (p. 1507) shows ten samples taken by him on this drift at eight foot intervals, as follows:

Width in Feet	Per ct W03	Factor
5.30	.00	.0000
5.25	.00	.0000
3.80	.00	.0000
5.30	.00	.0000
6.16	.00	.0000
4.50	.35	1.5750
4.80	.00	.0000
2.00	3.70	7.4000
3.20	.00	.0000
1.70	.25	.4250
42.01		9.4000

Average Width 4.2 ft.

Average of above ten samples obtained by dividing 9.4000 by 42.01 gives an average of .22 per cent W03; dividing 42.01 by 10, the total number of samples, gives an average width of the sample taken as 4.2 ft.

The figure 85 feet obviously means no more than that the drift has been extended that distance.

It will be seen that out of the ten samples taken, seven

showed no tungsten; one, .25 per cent; one, .35 per cent, neither of which are commercial ore, and only one sample of the ten showed ore of a commercial character; in that single instance the sample was only two feet wide; the average of this ore, as shown by said report, is .224 per cent which is far below commercial grade, and this item, instead of being regarded as low grade ore would be considered as not showing any ore and worthless.

ITEM 2:

> "Drift number one 60 feet beyond Bancroft sampling. Number two South tunnel 60 feet beyond Bancroft sampling. Value of ore one and one-half per cent."

As to this item, the Court says (p. 1425):

> "Bancroft's assay taken 60 feet beyond his first sampling in No. 2 South was 2 per cent instead of 1.50 per cent. The average of Bancroft's 7 assays in that drift was .63 per cent."

Bancroft's report (p. 1507) shows seven samples taken by him on this drift as follows:

Width in Feet	per ct W03	Factor
3.8	0.20	.7600
4.75	.60	2.8500
4.70	1.45	6.8150
4.10	.20	.8200
5.00	trace	.0000
4.00	0	.0000
3.66	2.00	7.3200
30.01		18.5650

Average Width 4.29 ft.

Average of ore is 18.5650 divided by 30.01, which equals .60 per cent W03; dividing 30.01 by 7,, the total number of samples, gives an average width of the sample taken as 4.29 ft.

This ore body referred to in Item 2 is the same ore body which Nenzel in his letter of February 14th (Plff's Ex. 2, p. 781) referred to as being "over 15 feet wide and a good grade of ore." It will be seen that of the seven samples taken by Bancroft, there was only one which sampled 2 per cent, and the average of the seven samples taken was .60 per cent, instead of the value being one and one-half per cent as represented in the telegram, and the average width was 4.2 ft. instead of 15 feet as represented by Nenzel in his letter of February 14th, above referred to. The Court in this instance has considered the one sample showing 2 per cent ore instead of taking into account the average of the seven samples covering the vein as a whole. The amount of ore cannot be determined from only one sample and the representation was intended to apply to the entire distance of extended development referred to. Certainly no one could afford to mine ore only from a particular point on a particular drift.

ITEM 3:

> "Number 2 North 275 feet from shaft, average width of vein 9 feet. Ore milling one per cent."

As to this item, the Court finds:

> "Bancroft's assay, taken 275 feet North from the shaft in No. 2 was 1.60 per cent instead of 1 per cent."

Bancroft's report (p. 1507) shows sixteen samples taken by him on this drift as follows:

Width in Feet	per ct W03	Factor
7.20	.80	5.7600
6.10	0	000
7.66	.15	1.1490
6.20	0	000
5.30	0	000
.75	0	000
5.50	.10	.5500
5.00	.50	2.5000
3.50	0	000
2.60	0	000
1.70	0	000
5.33	.25	1.3325
4.20	.70	2.9400
6.40	.50	3.2000
5.00	.25	1.2500
4.50	1.60	7.2000
76.94		25.8815

Average Width 4.81 ft.

Average of ore is 25.8815 divided by 76.94, which equals .34 per cent W03; dividing 76.94 by 16, the total number of samples, gives an average width of the sample taken as 4.81 ft.

Here again the Court picks out one solitary point which was 267 ft. North from the shaft, and finds that the ore assayed 1.60 per cent instead of 1 per cent, as represented; whereas the Court should have taken the average of the sixteen samples taken, which was only .34 per cent and which is not commercial ore. Furthermore, the Court entirely overlooks that part of the representation as to the width of this item, which instead of being 9 ft. as represented, is only 4.81 ft. or practically only one-half of what it was represented to be.

ITEM 4:

"No. 2 South 100 feet beyond Bancroft sampling; average width of vein four and one-half feet; value of ore, one-half of one per cent."

The Court is correct in saying that this item is inaccurately designated, as Bancroft's final report does not show any extension on level No. 2 South beyond the 60 feet from Bancroft's sampling as set forth in Item 2 above.

ITEM 5:

"Number 3 Northdrift 60 feet from shaft. Vein 10 feet wide. Value of ore one and one-half per cent."

As to this item, the Court finds:

"Bancroft's nearest assays 60 feet North on No. 3 were 1.20 per cent and 1.35 per cent, instead of 1.50 per cent. Five assays taken by Bancroft within 60 feet from shaft averaged 1.89 per cent."

Bancroft's report (p. 1507) shows five samples taken by him on this drift as follows:

Width in Feet	per ct W03	Factor
4.66	1.07	4.6600
8.50	2.75	23.3750
8.00	1.15	9.2000
5.40	3.35	18.0900
6.00	1.20	7.2000
32.56		62.5250

Average width 6.51 ft.

Average of ore is 62.5250 divided by 32.56, which equals 1.92 per cent W03; dividing 32.56 by 5, the total number of samples, gives an average width of the sample taken as 6.51 ft.

The actual condition obtained by multiplying the average width of 6.51 feet by the average percentage of 1.92

gives us a condition of 12.5184, as compared with the represented condition of 15.0000, obtained by multiplying the represented width of 10 feet by the represented percentage of 1.50; or, in other words, the conditions of the mine as to this item were represented to be 20 per cent better than they actually were. The Court in this instance entirely overlooked the discrepancy between the width of the ore body, as represented, and as shown on Bancroft's report.

ITEMS 6 and 7:

As to items 6 and 7, the Trial Court's view are substantially correct.

We submit that the Court came to a wrong conclusion as to the correctness of these representations by taking isolated samples instead of the average with reference to certain items and by reason of its overlooking and not considering the important discrepancies between the representations and the true facts as to the widths of the different bodies of ore mentioned in the telegram and which greatly reduced the amount of tonnage of the ore in sight in the mine. The correctness of Bancroft's report was not questioned on the trial. An examination of same conclusively establishes the falsity, as above pointed out, of the foregoing representations contained in the telegram of February 24th which Nenzel admits having sent to Taylor and, we submit, clearly shows that the Court erred in finding said representations to be true.

In this connection it is quite significant, too, that counsel for defendants carefully avoided to ask either of the defendants Nenzel or Friedman any questions in regard to the foregoing letters and telegrams sent by them to the plaintiff or as to any of the representations of facts therein made by them as to the development of the mine. Following the above representations by Nenzel, Mr. Taylor

on March 7th wrote the Tungsten Company (Plff's Ex. 4, p. 785):

> "The results of development work in the mine as **recently reported** are certainly most gratifying and if they continue as well I think there is a chance that by the beginning of April I may be able to persuade some New York people to advance the necessary money to clean up all the company's indebtedness in return for some modified form of option."

From this it will be seen that Mr. Taylor relied upon the reports which he was receiving and that he had in mind and called to the attention of the defendants the possibility of making a new arrangement whereby the necessary money could be obtained to clean up the company's indebtedness. Unquestionably Taylor's suggestion of raising money to pay the debts of the company was prompted by the **favorable reports which he had received from Nenzel.** The company needed the money badly and they were very anxious to have Taylor obtain it for them. Having succeeded in interesting him along these lines and by means of their representations having induced him to make this suggestion, they seized upon it and followed it up with several telegrams and letters from Nenzel and Friedman above set forth, each time giving more and more favorable reports of the new and further developments of the mine. In Nenzel's letter of March 10th he calls attention to the fact that they have encountered some very rich ore and that the ore contains so much scheelite that they are unable to handle more than 40 tons per 24 hours in the mill, and on March 21st he presses the matter further and writes:

> "The mine is looking better than ever. The ore has been of an exceptionally high grade character."

And again on March 25th, Friedman, President of the company, wires:

> "Am sure you will find mine development fulfilling your most sanguine expectation."

and, anxious to bring the matter to a head, suggests that Taylor and Bancroft come to Lovelock that week so that some modified arrangement might be arrived at. Taylor has now become very much interested, relying upon the glowing reports he had received, but being mindful of the fact that in order to raise money on a mining proposition it is absolutely essential to be able to present to the parties advancing the money facts and figures showing the tonnage and value of ore in sight, on March 25th, in response to the letter which he received from Friedman, suggested that the defendant Poole come to Denver during the first week in April

> "bringing **exact data as to development work, assays, etc.,** so that he and Bancroft together can work up **a definite tonnage statement of present ore developed."**

The Court will note that Taylor was asking for **exact** data of development work and assays and a **definite** tonnage of ore developed. Nenzel replied on March 27th that no **accurate** survey of the mine development had been made since Mr. Bancroft was out there, but that he expected to have their engineer out there within a week so as to check up the development work and "no doubt you will receive a report noting the changes that have been made since Mr. Bancroft completed the work of examination." This letter contained the further favorable news which was false that "the fourth level has been cut and in drifting North the vein is seven feet wide, and in drifting South the vein is ten feet wide, all in exceptionally high grade ore." Following this correspondence, Poole,

Nenzel and Murrish proceeded to Denver, arriving there on Sunday, March 30th, 1919, where they met Mr. Taylor, and this brings us to the point where the second charges of misrepresentation are alleged to have been made.

SECOND CHARGE OF MISREPRESENTATION

As to what the Trial Court in its opinion (p. 1428) refers to as the second charge of misrepresentation alleged in the complaint, namely,

> "that Poole, Murrish and Nenzel, at Denver falsely and fraudulently represented to Taylor that since the examination of the mining claim by Bancroft in January additional ore bodies had been developed, and that there was then blocked out, in sight and ready for mining over 60,000 tons of scheelite ore, which would carry an average of 1.75 per cent tungstic acid; that such representations were false, made for the purpose of inducing him to undertake and carry out the terms of the agreement of April 2nd, and were relied on by him to his prejudice."

the Court states:

> "In my judgment Taylor was neither misled nor deceived by the defendants."

and also finds that

> "The evidence is not sufficient to show that the alleged false representations as to tonnage in the mine were made; and even if there were such representations, Taylor was not thereby induced to enter into the contract of April 2nd, or to attempt to perform its conditions. That contract, as well as the option of January 16th, expired by limitation June 16, 1919; prior to that date no deposit in the Wells Fargo Nevada National Bank of San Francisco of an amount sufficient to liquidate the indebtedness of the defendant corporations were made by or for Taylor. He never performed what he agreed in the contract to do; he never made an unconditional offer of performance and never prior to June 16th was he actually ready,

able and willing to perform unconditionally."

In the Assignment of Errors "V" and "VI," the plaintiff assigns as errors on this appeal that the Court erred in making said findings and arriving in its said findings and conclusions of law.

Pursuant to the forgoing correspondence, Nenzel wired Taylor on March 28th (Plff's Ex. 14, p. 803):

> "Murrish, Poole and I leave number twenty tomorrow morning arriving Denver Sunday afternoon."

TAYLOR'S TESTIMONY

Taylor testifies that they arrived in Denver on Sunday, March 30th, and came to his office in the Symes Building, and that he had there at that time the original supplemental report of Bancroft which had Plate No. 5 (Plff's Ex. 15, p. 45) attached thereto; that they were together that afternoon engaged in a general discussion about the tungsten situation, conditions of the market, **developments and conditions of mine,** probabilities that he would not exercise the original option and questions of policy of the company, and so forth; that he showed Poole Bancroft's original report and asked him if he would like to read it and Poole said he would, whereupon Taylor told him he could take it with him to his hotel that night and bring it back the next day (p. 46). Taylor asked Poole to "plot on that map information which he had as to the recent developments at the mine or developments since Bancroft's report had been made, at the mine" (p. 47); that Poole, Nenzel and Murrish came down to his office Monday morning, the following day, and he asked Poole if he had "put on the original Bancroft report memoranda showing the additional tonnage of ore with its values, that had been blocked out since his report;" and that Poole stated "that he had

not had an opportunity to do that; he had with him some maps, mining maps or reports, records."

Taylor thereupon said: "Well, let us get the figures down now." Mr. Poole gave him lines and figures which were put down by him, Poole giving the tonnages and assay values, widths of ore, and other memoranda that was put on at that time, with lines to represent the limits of the ore bodies, together with the figures of commercial ore which he claimed were shown by those lines. These pencil lines and figures were placed on Plate No. 5 on Monday, the day followng their arrival (p. 48). Poole stated to him certain areas blocked out and asked him to put it down on this map and Taylor placed it on the map. All of the pencil lines and all the pencil memoranda were placed on the map by Taylor in Poole's presence, Poole reading the figures and standing over Taylor while Taylor put the figures down. Some of these figures Poole read from his map and some of them from memoranda that he had with him. Poole brought with him a large map that morning (p. 49). This map which Poole had was what was called the mining map (Plff's Ex. Y) which Poole says (p. 546) he had Huntington (the Tungsten Company's engineer) prepare and which he took with him to Denver and which he turned over to Taylor at his office on his arrival in Denver on Sunday. Murrish was there part of the time (p. 50) and Nenzel all of the time (p. 51) while Taylor was putting the lines andfigures down on the map which he had and they could not help hearing the figures given and seeing what was being done while they were in the room as it was a small room. Poole said that he had not had an opportunity to put the lines and figures on, but that he had read Bancroft's report and they discussed it at that time (p. 53). After these notes were placed upon Plate No. 5 of Mr. Bancroft's report on Monday, Poole stated to Taylor in the presence of Nenzel and Murrish "that there was

over 60,000 tons of ore developed within the blocks indicated by those lines by the pencil lines shown on the map, which would average over 1.75 per cent tungstic acid" (p. 56). This statement was made after the figures had been put down (p. 57).

Summarized, Taylor's story up to this point is that pursuant to the correspondence which they had had, Poole, Nenzel and Murrish arrived in Denver on Sunday, March 30th, and went to his office where they met him; that after some discussion Taylor gave Poole Bancroft's original report, which had attached to it Plate No. 5, which showed 8,111 tons of ore developed. Poole had the mining map with him which he claimed showed the recent developments of the mine since the first examination made by Bancroft, and Taylor requested Poole to take Bancroft's first report and Plate No. 5 to his room in the hotel and place thereon the memoranda showing the additional tonnage of ore with its values that had been blocked out since Bancroft's report; that Poole took the report and returned to Taylor's office the next morning, Monday, and stated that he had read Bancroft's report but had not had an opportunity to add to it the memoranda showing the additional tonnage and values of ore which he claimed had been blocked out since Bancroft's report; that thereupon Taylor suggested they proceed at once to do so and that Poole furnish the lines and figures from the mining map which he had to Taylor and Taylor put them down on the photostat Plate No. 5, which was attached to Bancroft's original report so as to make it correspond with the mining map; that after the figures had been put down, Poole, in the presence and within the hearing of Nenzel and Murrish stated that there was over 60,000 tons of ore developed within the blocks indicated by the pencil lines shown on the map which would average over 1.75 per cent tungstic acid. Taylor testifies that these lines and figures were put down and

said statement of tonnage and values was made by Poole on Monday, March 31st, and that following this on Tuesday and Wednesday they carried on negotiations which finally resulted in the agreement which was entered into on April 2nd.

POOLE'S TESTIMONY

Poole's story is that he, Nenzel and Murrish arrived in Denver on Sunday, March 30th, and saw Taylor on that day at his office, probably an hour after their arrival; that on Monday they saw Taylor again at his office (p.463); that on their arrival on Sunday exhibited to them Bancroft's original report, Plate No. 5 (p. 464); that at that time there were no pencil marks or lines on Plate 5; that he does not know when they were placed there, nor by whom, and that he did not see them placed there and was not present on any occasion when they were placed there; he denies that on Sunday Taylor asked him to plot on Plate 5 or on any other plate or plates recent developments at the mine or developments since Bancroft's report had been made (p. 465); that he was present at Taylor's office on Monday and that Nenzel and Murrish were present all the time (p. 466). He denies that Taylor on Monday asked him if he had put memoranda on original Bancroft report and denies that he stated to Taylor that he had not had an opportunity to do that; also denies that Taylor suggested putting down figures on that occasion and that no figures were given by him or put down on the map by Taylor on that occasion (p. 467). He testifies that no line or figure or memoranda giving tonnages or assay values or width of ore or any other memoranda was put down by Taylor on Plate 5 on Monday, March 31st, in his presence (p. 468); that he did not on Monday say to Taylor that certain area in the property was blocked out, and that the pencil marks on Plate 5 were not placed there in his presence

(p. 469); that he did not on that occasion read the figures to Taylor; did not stand over his chair and tell him any figures or lines; and that he did not tell Taylor on that day or any other day that he had not had the opportunity to put the lines and figures upon Plate 5 (p. 470). He denies making any statement on that occasion that there were over 60,000 tons of ore developed within the blocks indicated by the pencil lines shown on Plate 5, which would average over 1.75 per cent tungstic acid (p. 471). He denies that he stated to Taylor that the figures on Plate 5 represented the state of tonnage of commercial ore represented within the lines upon the map, and denies that he on that occasion or ever stated to Taylor that the figures 42,728, 9,250 or 4,200, appearing upon Plate 5 represented the tonnage of commercial ore existing between the lines drawn on that map from the bottom of the shaft to a point on level number 2, or any other part or portion of that map (p. 475) and denies that he ever said to Taylor in substance or effect that he knew definitely from the data upon Plate 5 that there were 60,000 tons of ore or any other number of tons in any portion of the mine; denied that he calculated on that day or at any other time or gave to Taylor any of the above figures (p. 476); denies that he said to Taylor on that occasion or on any occasion that there were 60,000 tons of ore in sight which would average 1.75 per cent tungstic acid (p. 478); in fact, he denies having made any statement whatever to Taylor on either Sunday or Monday regarding the amount of tonnage of the ore in the mine, but admits on cross-examination that on Sunday he gave Taylor the mining map (Plff's Ex. Y, p. 546) and called his attention to the percentages and distances as graphically represented thereon (p. 547); and that he showed the mining map to Taylor at that time and when he left took with him Plate 5 and returned to Taylor's office the next morning, but that on both of those days

no representation was made by him with regard to tonnage or percentage of ore. On Tuesday, April 1st, he says that he again met Taylor at his office and that there was no discussion of the tonnage of ore in the mine on that day, but that on that day Taylor had a discussion with Murrish which Poole heard with regard to the advantages or disadvantages that would come to Murrish as a stockholder in the event that a proposition (Defendant's Exhibit B) then presented to them by Taylor should be accepted by them (p. 479). He testifies that Taylor said, "If you accept this present proposition your stock, if the mine lasts a considerable period, will be worth more to you than if I exercise my option of January 16th" and that Taylor said that he contemplated if he got such a deal as therein proposed from them that he would go East and try and interest some Trust Company and he felt that 35,000 tons on an $8 basis, and 25,000 tons on a $10 basis, would put the mine on a **banking basis,** and that thereupon they tentatively agreed upon the terms in that proposition (p. 480); that he, Nenzel and Murrish took this document (Defendant's Exhibit B) to the hotel in the evening, and read it over carefully and scrutinized it and came to the conclusion that they had not understood what Mr. Taylor was proposing in that document (p. 481); that he and Nenzel gave their assent orally to the proposition finally embodied in Exhibit C annexed to the plaintiff's complaint, that is, the contract of April 2nd, Tuesday evening, April 1st, and that Murrish gave his consent Wednesday morning, April 2nd (p. 484); that they all met at Taylor's office on Wednesday morning of April 2nd and Mr. Taylor presented a typewritten contract in which he had essentially embodied the terms as Nenzel and Poole had agreed with him on Tuesday night (p. 485); that after some discussion it was decided to change some of the phraseology and Mr. Taylor

proposed that Murrish rewrite it and embody the same essential facts in what he considered proper legal phraseology; whereupon Mr. Murrish and Mr. Taylor then retired to another room and started to dictate the agreement to a stenographer (p. 486); that while said dictation was in progress Taylor presented one of the copies of the photostat called Plate 5 to Poole and said, "I wish you would put the additional development work on it that has been done since Mr. Bancroft's examination of January 22nd" (p. 487). This was on Wednesday, April 2nd, in the forenoon. Nenzel was present, but Murrish was in the other room dictating the contract (p. 488). That Taylor said, "I wish you would put additional work on there which has been done since Bancroft's examination and also I wish you would show the additional tonnage of ore which has been developed by that additional work and use the method that Bancroft has used in his report," to which Poole replied, "Mr. Taylor, it is very easy to put additional work on there, but it is not easy to calculate the additional tonnage according to Bancroft's method, because it is not clear what method Mr. Bancroft has used in his report in calculating tonnage. 'Well,' he says, 'I have the tonnage method used by Mr. Bancroft.' He then got some memoranda or written document of some kind setting forth how Bancroft calculated tonnage according to different development." Thereupon they proceeded to transfer the lines and figures from the mining map Y to the photostat Plate 5. Taylor did the mathematical calculations from the dimensions Poole had given him and from the divisions for tonnage and Poole entered them on the photostat map (p. 494). Poole admits that 4200 was certainly one of the figures that they got as the result of their calculation, but is not certain positively as to the others (p. 495), but he is certain that there was no block in which there was 42,000 tons and that the sum total of the tonnage represented in all the blocks

was not 42,000; that it was less; but that he did not on that occasion or on any occasion prior to the entering into the contract (Exhibit C) state or represent to Taylor "that there were in that mine either blocked out or in sight or developed any quantity of ore whatever" (p. 496; that the contract (Exhibit C) was signed subsequent to the conversation when the lines and figures were put down on the photostat, and that there was not any other or further discussion in which tonnage or development or figures of ore or ore bodies was mentioned (p. 497); that he cautioned Mr. Taylor against the unreliability of those statements on the map and told him those figures were merely estimates which had been placed on that map by John Huntington who was the mining engineer who had brought this map up to date, and that Mr. Huntington had got that information from Mr. Morrin who was the superintendent, and Mr. Morrin had arrived at those values by panning in the mine; and he knew as well as he did that panning was a very unreliable way of arriving at the value of ore (p. 498); that he had no other conversation with Mr. Taylor after the contract was signed in which tonnage was mentioned or any figures were discussed (p. 499).

Summarizing Poole's story, he, Nenzel and Murrish saw Taylor on Sunday, Monday, Tuesday and Wednesday, at none of which times was there any statement whatever made by Poole as to the development, tonnage or percentage of ore or ore bodies in the mine. He admits that he saw Bancroft's original report on Sunday and that he on that day turned over the mining map to Taylor and called his attention to the extensions and percentages shown thereon. No explanation is made by him as to what they were discussing on Sunday or Monday, but he is sure that neither he nor his associates mentioned tonnage at any time. He claims, however, that on Tuesday Taylor presented Exhibit B, out of a clear sky, which contained fig-

ures showing tonnage required to put the proposition on a banking basis, 35,000 tons on an $8 basis, and 25,000 tons on a $10 basis. Upon being asked where Taylor obtained these tonnages he said they were a figment of Taylor's imagination. This document (Exhibit B) according to Poole's story, constituted a proposition made by Taylor which started their negotiations and finally was accepted by them and resulted in the Contract of April 2nd.

NENZEL'S TESTIMONY

Now, coming to Nenzel's story, counsel for defendants adroitly avoids asking him anything about his telegrams and letters which he sent Taylor prior to their meeting in Denver, or about anything which transpired before that meeting, when counsel for plaintiff on cross-examination was prevented from inquiring into same by objection of defendant's counsel (pp. 613-614). Counsel starts right off by interrogating Nenzel as to what occurred at the Denver meeting (p. 601). Nenzel, after testifying that he, Poole and Murrish were with Taylor in Denver on Sunday, March 30th, Monday, March 31st, Tuesday, April 1st, and Wednesday, April 2nd, says that neither he, Poole or Murrish on any of said days ever told Mr. Taylor that this mine contained any number of tons or any percentage of tungsten; that it was not mentioned at all as far as they were concerned; that it was not mentioned on Wednesday until after Mr. Murrish and Mr. Taylor had started to drafting the contract (p. 616); that after they had agreed on the deal and Mr. Murrish was drawing the papers there was some general discussion with reference to tonnages and percentages between Mr. Poole and Mr. Taylor, which resulted in the photostat map; but that all of this took place after they had agreed upon the deal and Murrish was drawing the contract (p. 617); that Poole had the mine map and Taylor had a photostat and that they transferred

from the mine map which Mr. Poole had on to the photostat which Mr. Taylor had the extensions of the development work which was put on the mine map by Mr. Huntington before they left Lovelock for Denver. These were given by Mr. Poole to Mr. Taylor at that time. They had been called to Mr. Taylor's attention on Sunday; they were already on the mining map when they brought it to Denver (p. 624). Mr. Poole explained to Mr. Taylor that the footages of development were accurate. as he could vouch for Mr. Huntington's accuracy in making surveys, but that the assays thereon or values were estimates made by Ben Morrin and placed on the map by Mr. Huntington and Mr. Taylor should take them for what they were worth (p. 627); that Mr. Taylor replied that "if they were untrue it would affect Mr. Poole personally in the future, or words to that effect" (p. 628). Although Poole testified that Taylor presented a proposition (Deft's Ex. B) at their meeting in Denver on Tuesday, which formed the basis of their negotiations and from which the contract of April 2nd resulted, and although Poole testified that he, Nenzel and Murrish took Exhibit B with them to the hotel that evening and carefully examined and scrutinized it, it will be noted that no question whatever was asked Nenzel by counsel for defendants about important document, Defendant's Exhibit B.

Summing up Nenzel's testimony as to what occurred on the four days at Denver, he corroborates Poole's testimony to the effect that neither he, Poole or Murrish ever told Taylor that the mine contained any number of tons or any percentage of tungsten, and that it was not mentioned at all by them; that not until Wednesday, after the deal had been agreed upon, and Murrish was drawing the papers, was there any discussion, and then only a general discussion between Poole and Taylor, regarding tonnages or percentages; he also states that Poole showed Taylor the min-

ing map on Sunday and showed him how much work had been done since Bancroft's report and that Poole explained to Taylor that the footages of the development were accurate and he would vouch for Huntington's accuracy in making the surveys, but that the assays thereon or values were estimates made by Morrin and placed on the map by Mr. Huntington and Mr. Taylor should take them for what they were worth. It will be noted that Poole in his testimony in this connection stated, "But I won't vouch for these estimates on here as having any meaning," and "I want you to get that clearly in mind because I don't want to make any misrepresentations to you," to which he testified Taylor replied, "the only effect that any misrepresentation on your part would have on me would be to cause me to lose confidence in you and,therefore, I would not use you as superintendent of the property," whereas Nenzel testifies that Poole stated "that the assays thereon or values were estimates made by Ben Morrin and placed on the map by Mr. Huntington and Mr. Taylor should take them for what they were worth," to which Mr. Taylor replied, "if they were untrue it would affect Mr. Poole personally in the future, or words to that effect." Other than the above stated attempts of Nenzel to corroborate Poole, there is nothing to Nenzel's testimony. He does not state, nor is he asked, about what they were doing during those four days. He makes no reference to, nor is asked, about the Defendant's Exhibit B, which Poole testifies formed the basis of the negotiations which resulted in the contract of April 2nd. No explanation is offered by him at to what took place during those four days or how they happened to come to an agreement on April 2nd. His testimony practically amounts to this: that they all met in Denver for the purpose of making a deal; that they were together during all of the four days; that during all of that time they did nothing, said nothing; but that on the last day, on Wed-

nesday, they signed a contract; that there was no discussion of tonnage or percentages by any of them other than some general discussion between Poole and Taylor while the contract was being typewritten.

MURRISH'S TESTIMONY

We next come to Murrish, the lawyer of the party. He says he was in Denver on Sunday, Monday, Tuesday and Wednesday with Taylor, Poole and Nenzel (p. 630). He testifies that during all of the times while he was in Denver, so far as he was concerned, there was no representations or statements of any kind made by either himself, Mr. Nenzel or Mr. Poole as to the amount or character of the ore in the mine (p. 649). The only testimony given by Mr. Murrish regarding Defendant's Exhibit B, upon which Poole placed so much importance, was in reply to the question: "Do you remember that document being used down there in conversation?", to which he replied, "Yes sir" (p. 654). As to the mining map which was used at the meeting in Denver, he was asked, "And the map referred to by Poole and marked Exhibit Y, do you know what that is; did you see that in Court? A. Yes. Q. Was that used down there in the discussions and conferences? A. Yes." This is all he had to say about this important document. Then he further testifies that he had a conversation with Mr. Taylor at the Palace Hotel at Denver with reference to his refusal to sign the agreement of April 2nd when that matter was discussed, and states that practically all that took place at that time was "that Mr. Taylor said I had given my word to him that I would sign it, and I said that I had not given my word, but if he said I had, that I would sign it." He further states that Nenzel and Poole were present at the time. He also testifies that he did not hear the subject matter of Bancroft making any further

examination of the property mentioned by Taylor or Poole at the Denver conference, and that he did not hear the subject matter or the results of the Morrin sampling being put upon the mine map being discussed by either of them, and this constitutes about all Mr. Murrish had to say about what occurred at the Denver meeting.

The financial distress of the Tungsten Company at the Denver meeting was shown throughout the testimony and was admitted by the defendants' counsel, Mr. Cooke, when he said, "I will say very frankly my purpose is to show they went down there oppressed by reason of the financial condition of the company, and these debts piling on them, and didn't go down there simply for the purpose of getting a substitution of creditors."

In analyzing the testimony bearing upon the charge that the individual defendants (except Loring) falsely represented that 60,000 tons of 1.75 per cent tungsten ore was developed in the mine, let us keep in mind these admitted facts:

(1) That the Tungsten Company was in dire financial distress, owing its creditors $220,000 or more.

(2) That Taylor had telegraphed and written, asking for "definite statements of development work accomplished, assays, size of ore shoots and tonnage."

(3) That Taylor was considering the property on a **"banking basis."**

(4) That Taylor was to raise the money, $220,000, for the Corporation **"by borrowing."**

The defendants had been advised by Taylor that there is no hope of his being able to exercise his option of purchase of January 16th, 1919. It is necessary to raise funds and the defendants for this purpose are anxious to enlist the services of Taylor. The only method suggested for meeting this emergency is through the medium of a loan sufficiently large in amount to pay off the indebtedness of

the Tungsten Company. At the time Taylor entered into the option contract with the defendants on January 16th he had an examination made by Bancroft, an engineer, of the amount of ore developed in the mine, which showed a tonnage of 8,111 tons. This examination was made from January 19th to January 27th, 1919, as shown by Bancroft's report (Plff's Ex. 15, p. 1476). At this time Bancroft, as part of the job he was doing for Taylor, also outlined a plan for the further development of the mine, which was accepted by the defendants as a feasible plan, and they agreed to carry out the development along the lines indicated by him. On the 7th day of March, 1919, Taylor wrote Poole, "Could you not arrange to send us by mail once a week a **definite statement of work accomplished, assays, size of ore shoots, etc.,** so that I may keep this work plotted up on the map of development work." Later, on March 25th, and after Taylor had informed the defendants that he would probably not be able to go through with original option contract and after having received all of the glowing reports in connection with development of the mine, as set forth above under the first charge of misrepresentations, Friedman suggested that they meet at Lovelock and enter into a new arrangement. Taylor on the 25th day of March wrote Friedman that it would be impossible to go to Lovelock and suggested that Nenzel, Murrish and Poole be appointed a Committee to represent the stockholders and suggested that Poole come to Denver during the first week in April **"bringing exact data as to development work, assays, etc.,** so that he and Bancroft together could **work up a definite tonnage statement of present ore developed."** That letter and that statement are significant and must carry throughout this case in connection with the testimony of the various witnesses as to what took place in the City of Denver in the latter part of March

and the 1st part of April, resulting in the contract of April 2nd. It is admitted that pursuant to this correspondence Poole, Nenzel and Murrish met Taylor in Denver on Sunday, March 30th, and were with him constantly until the following Wednesday, at which time the contract of April 2nd was signed. There is no dispute as to the facts that Poole, Nenzel and Murrish arrived in Denver in the forenoon on Sunday, March 30th, 1919; that they went to Mr. Taylor's office where they met him; that they were with Mr. Taylor Sunday; that on that day Taylor had with him Bancroft's original report with the photostat plate No. 5 attached thereto, which Taylor showed to them and which Mr. Poole took away with him to his hotel on Sunday evening; also that at the same time on Sunday Poole had with him and turned over to Taylor the mining map, and called Taylor's attention to the extensions and percentages shown thereon; that the lines and figures which appear on Plaintiff's Exhibit Y, showing the extensions and development of the work since Bancroft's original examination, were on that map at that time; that Poole, Nenzel and Murrish returned to Mr. Taylor's office and met him there on the following day, Monday, March 31st; that they were with Mr. Taylor all of that day and all of the next day and also on Wednesday until the agreement of April 2nd was signed in the afternoon of that day. There is, however, a sharp conflict in the testimony as to whether any representations as to tonnage or percentages of ore were made and as to what occurred at this meeting in Denver. It, therefore, become necessary to consider all the surrounding circumstances in weighing the evidence for the purpose of ascertaining the truth with reference to what actually took place on the various days during which they were in session at said meeting. Let us first hark back a bit to what transpired after Bancroft made his original exam-

ination of the mine and just what led up to and what the purpose of this meeting in Denver was. It will be remembered that when Bancroft made his original report he outlined a plan for the future development of the mine. This plan met with the approval of Poole and it was decided to carry on the development along the lines recommended by Bancroft. Shortly thereafter Nenzel started to send to Taylor, in the shape of telegrams and letters, reports containing positive statements as to the further development of the mine and the percentages of the ores. On March 7th Taylor requested Poole to mail to him weekly **"a definite statement of work accomplished, assays, size of ore shoots, etc."** Pursuant to this request Nenzel continued to send his reports to Taylor. After some correspondence, on March 25th, Taylor writes to Friedman requesting that Poole come to Denver during the first week in April, "bringing **exact data as to development work, assays, etc.,** so that he and Bancroft together could work up **a definite tonnage statement of present ore developed."** In response to this letter, Nenzel wrote that Poole and his engineering force had been rather busy at Rochester and that no accurate survey of mine development had been made since Mr. Bancroft was out there but that they expected to have their engineer out there within a week so as to check up the development work and no doubt Mr. Taylor would receive a report noting the changes that had been made since Mr. Bancroft completed the work of examination. The meeting in Denver followed for the purpose of entering into a new or modified arrangement and which resulted in the contract of April 2nd. The acts of the parties and this correspondence which preceded the meeting at Denver indicates beyond any question what information regarding the condition of the mine Taylor wanted them to produce at this meeting and what they in their correspondence

had given him to understand they would produce at that meeting. Taylor wanted exact data of development work, assays, size of ore shoots, etc., so as to be able to work up a definite tonnage statement of the present ore developed. That was what he wanted. That was what he required in order to be able intelligently to discuss the basis of a new contract. That is what he required in order to be able to go out and **"borrow"** money on a **"banking basis"** and that is what they agreed to produce for him at this meeting in Denver. Poole, Nenzel and Murrish, when they left for Denver, took with them the mining map which purported to show and which they represented did show the extent of the development of the mine since the date of Bancroft's first examination. The distances of the additional development were graphically shown on this map and this map bore upon its face figures showing the percentages of ore. They went to Denver equipped with this map in order to be able to supply to Taylor the information which he desired. Upon their arrival in Denver on Sunday they immediately went to Taylor's office. Taylor produced the original report of Bancroft with the photostat attached thereto and showed it to them. They in turn, as they say, turned over the mining map to Taylor and called his attention to the further development and percentages shown thereon. Taylor says that he asked Poole to take the photostat to his hotel that evening and to plot on same the distances and figures shown on the mining map, so as to make it correspond therewith and that when they returned to Taylor's office the next morning, Monday, Taylor asked Poole if he had transferred the lines and figures to the photostat, in reply to which Poole said that he had not had an opportunity to do so, whereupon, according to Taylor's story, Taylor suggested that they proceed at once to make the transfer, which suggestion was agreed to and the work

was done by Poole himself. Taylor says, and it is consistent with every fact and circumstance surrounding the transaction, that they then proceeded to make calculations as to the amount of tonnage based upon the lines and figures indicated on the mining map. That such calculations were made upon the same basis as used by Bancroft and as a result thereof it was found that the indicated tonnage was in excess of 60,000 tons of commercial ore. At this point Taylor says that Poole made the representation to him: "There are 60,000 tons—over 60,000 tons—of 1.75 per cent tungsten in this mine." Taylor's testimony is that after having made these calculations on Monday and after he had obtained this information they then proceeded on the day following to negotiate and discuss propositions and that finally he, relying upon the representations which had been made to him as to the condition of the mine, executed the contract of April 2nd and undertook the performance thereof. This, it seems to us, is the natural and logical course which a transaction of this character would take. Let us not forget that Poole, et al were there to "**borrow money**," upon security and that Taylor was viewing the property not in the light of a speculation, but in the view of a banker. Now, as opposed to this story of Taylor, what do we find? In the first place, as to the letters and telegrams sent by Nenzel and Friedman prior to the meeting in Denver, and which contained misrepresentations as to the condition of the development of the mine, we find not one word from the lips of either Nenzel or Friedman in explanation or justification of the statements contained in these letters and telegrams. There was no way in which they could be explained and there was no way in which the statements contained in them could be justified, and they chose the course of refraining from testifying regarding them, and counsel for plaintiff was by objection of counsel for defendant prevented from cross-examining

Nenzel as to these matters. Next, we come to the meeting of the parties in Denver, and here the most important piece of evidence in the case makes its appearance—the mining map which Poole brought with him from Lovelock for the purpose of showing Taylor the condition of development of the mine. This document speaks volumes. On this map appeared lines and figures which by a recognized and simple process of calculation gave a result indicating a tonnage in excess of 60,000 tons of commercial ore. In other words, this map is a misrepresentation and a fraud and it bears on its face the evidence which corroborates Taylor's story as to the alleged misrepresentations regarding tonnage and percentage of ore in sight at that time. The defendants realizing the weight of this map as a piece of evidence in this case seek to avoid its effect in various ways as follows: Poole, Nenzel and Murrish would have the Court believe the unbelievable, that after Poole turned over this mining map to Taylor at his office on Sunday upon their arrival in Denver that no further reference was made to said map; no discussions were had as to the development of the mine; no mention whatsoever was made by them of tonnage or percentages of ore from that time until they and Taylor had agreed upon the terms of the contract of April 2nd, and while it was being typewritten; and that then, while the contract was in course of preparation the mining map was produced; the lines and figures transferred to the photostat and the calculations made by Poole and Taylor, and even then they claim that there was no discussion, no representations as to tonnages or percentages of ore. Nenzel testifies that there was simply a general discussion at that time between Poole and Taylor. These defendants, and especially Mr. Murrish, a lawyer, being fully aware of the importance, as a matter of law, of these representations as to tonnage and percentages of ore as constituting an inducement for Taylor entering into the contract of

April 2d, chose in their testimony to fix the time when the contract was being typewritten and after they had agreed to its terms as the time when the transfers of lines and figures from the mining map to the photostat and calculations were made by Poole and Taylor. This was to avoid its effect as an inducing cause for Taylor's making this contract.

Is it credible that three men, representing a corporation in financial difficulties, pursuant to request for exact data, assays, size of ore shoots, etc., on which to work out a definite tonnage statement of present ore developed, desiring to obtain a loan, should travel from Lovelock to Denver, spend practically four days, or over three full days, and never mention whether there was one ton or sixty thousand tons in the mine; whether the ore ran one-tenth of one per cent or ten per cent in value of tungsten? The Court, in weighing the evidence, will take judicial notice of the standard of prudent business methods (23 Corpus Juris 62). We cannot conceive how anyone could undertake to obtain a loan, especially of the magnitude of the one which was sought in this instance, without first having at hand two indispensible factors, namely the amount sought to be borrowed and the value of the property offered as security for the loan. This is particularly true in this case, as it is admitted by all of the witnesses that Taylor proposed to raise the money necessary to wipe out the indebtedness of the company by effecting a loan upon a banking basis; it is common knowledge that banks do not make loans without first inquiring as to how much the party wants to borrow and what security he has to offer for it. It is also well known that the only way to determine the value of a mine with any degree of certainty is by examining it and finding out the quantity and character of ore in sight in the mine. Is it the customary or usual way in which business men, wanting a loan, desiring to

extricate themselves from financial difficulties, asking for a loan and giving security and the security being a mine, act under such circumstances? Do business men like Mr. Taylor, about to undertake an enterprise of this kind, about to obtain a loan upon a banking basis, negotiate for three days with men who are experts and familiar with the conditions of development of the mine—the security for the loan, and never once ask or inquire as to the developments in the mine, the tonnage in it or the percentage or value of the ores in it? Or do they, as Taylor says, proceed at once to find out how much of a loan is required and the nature character and value of security which is to be offered? We submit that the story is absolutely unreasonable and beyond comprehension and that it is not worthy of belief or of any credence.

The Trial Court in its opinion (p. 1429), in referring to the alleged misrepresentation as to 60,000 tons of ore of an average of 1.75 per cent tungstic acid, says:

> "Taylor swears that Poole made the statement but Poole denies it, and in his denial is supported by Murrish and Nenzel. They go even further and say that prior to the time when they had agreed on the terms to be incorporated in the new agreement no statement had been made as to the tonnage of the mine. **This seems unreasonable when we reflect that the selling price of a mining property depends so much on the quantity of commercial ore in sight.**"

It will be seen therefrom that the Trial Court could not bring itself to believe the testimony of Poole, **corroborated** as it was by Nenzel and Murrish, all of whom were so anxious to get away from the charge of misrepresentation as to tonnage and percentage of ore that they shied at the mention of the words "tonnage" and "percentage." These words were taboo and the denials of these three witnesses in response to the categorical ques-

tions, put to them by counsel, as to whether either of them had made any representations as to tonnage or percentage, sound like the notes of a trained chorus.

When the terms of the contract has been agreed upon, and it was being typed, then according to the defendants' testimony, when there could be no question of inducement, they begin to discuss the vital question of tonnage in the mine and the value of the ore. Mindful however, of the fact that the mining map had been called to Taylor's attention immediately upon their arrival and mindful of the fact that the mining map itself was a misrepresentation as to the condition of the development of the mine, and that, the mining map itself might have been relied upon by Mr. Taylor and induced him to enter into this contract, these defendants sought other avenues of escape, and by their testimony sought to relieve themselves from responsibility for the representations appearing thereon. Accordingly, Mr. Poole testifies that at the time of making the transfers from the mining map to the photostat, and the calculations: "I had my mine map, Exhibit Y, which had been made by Mr. Huntington just before we came; he had put on these percentages and he had put on the graphic in pencil showing the extension of development work since Bancroft's report; and with this Mr. Taylor and I proceeded to put upon the photostat map, part of it in my handwriting and part of it in Taylor's, the extensions of work which had been made in the mine since Bancroft's first report (p. ——. Part of it in his handwriting and part of it in Mr. Taylor's. Mr. Taylor would do part of the work and he would do part of it. Poole said:

> "I told him those figures were merely estimates which had been placed on that map by John Huntington, who was mining engineer who had brought this map up to date, and that Mr. Huntington had gotten that information from Mr. Morrin, who was the sup-

erintendent, and Mr. Morrin had arrived at those values by panning in the mine; and he knew, as well as I did, that panning was a very unreliable way of arriving at the value of ore." (p. 498-499).

In other words, Poole, Nenzel and Murrish attempt to relieve themselves from and shift to Huntington and Morrin the responsibility for the misrepresentations shown on the mining map, but here in this instance again we find in the testimony not one word from Huntington or Morrin, although they were available, offering any explanation or justification for the misrepresentations appearing on the map. They undoubtedly could have stated how and under whose direction the extensions and figures were placed on the map and from what source they were obtained, but defendants' counsel preferred to have them refrain from testifying on this subject just as it was deemed advisable to have Nenzel and Friedman refrain from testifying as to the letters and telegrams which they sent and which contained the other misrepresentation as to the development of the mine. This should be taken into consideration by the Court in weighing the evidence (23 Corpus Juris 40). It is also well settled that positive testimony of a single witness should prevail over the strictly negative testimony of any number of witnesses (23 Corpus Juris 45). Poole would have the Court believe that he told Taylor that these figures were unreliable and that Taylor, although demanding exact data and definite tonnage figures, went ahead and executed the contract of April 2nd. He not only executed and signed his name to it, but spent his money in trying to put it through. When the Court comes to an examination of Exhibit Y, it will also find that the lines on the map are almost identical with and take in practically the same block of ground which is taken in by Mr. Taylor's additions to Plate 5 (Plff's Ex. 15). Poole also testified that Taylor told him that this loan was to be effected upon

a banking basis; that he was going to do business with some New York Trust Company or Bank on a banking basis; and yet Mr. Poole states that Taylor undertook this enterprise in the face of the fact that Poole told him, "You can depend on the amount of work that has been done in the mine, because Huntington is a good surveyor and reliable, but you must not depend upon the values." It is a well known fact that work in a mine does not mean anything unless there are some values and tonnage in it.

Mr. Nenzel's version of this conversation does not corroborate Poole in this regard but corroborates Taylor and shows that Taylor relied upon the value shown on the map and on Poole. Nenzel states that Poole told Taylor that he must not take the values as being reliable because they were made by Morrin from pannings and that Mr. Taylor said, "Well, Poole, I am depending upon you, and if there is any mistake about them you are the one that will suffer."—"If there is anything wrong with it you will be the one to suffer, because I am depending on you." Compare this with Taylor's story that after calculations and the representations as to the tonnage and percentage of the ore had been made on the Monday, which resulted in the execution of the contract of April 2nd "Exhibit C," they then proceeded during the next two days to carry on negotiations.

We submit that Taylor's story must be taken as the true statement of facts as to what occurred between the parties in Denver and that the testimony of Poole, Nenzel and Murrish is incredible and unworthy of belief.

Poole testified that defendants' exhibit "B" was produced by Taylor on Tuesday and formed the basis of their negotiations which resulted in their contract of April 2nd. (pp. 480, 481, 482).

On direct examination he further testified as follows:

"Q: I call your attention to a portion of this exhibit reading as follows: 'In order to make investment safe only

necessary to show at eight dollar market, 35,400 tons of ore; ten dollar, 25,500 tons of ore.' Did you on that occasion hear anything said upon that subject by Mr. Taylor?

"A. Yes, I did.

"Q. What in substance, did he say on that occasion?

"A. He said that he contemplated if he got such a deal as is here proposed from us, that he would go East, and try and interest some trust company, and he felt that 35,000 on a ten dollar basis would put that mine on a **banking basis**—on an eight dollar basis—; and on a ten dollar basis he felt that 25,000 tons would put the mine on a **banking basis.**' (p. 480).

When pressed on cross examination as to where Taylor got the figures of 35,000 tons, he said he thought it was "a figment of imagination." (p. 575).

Again pressed on cross examination he said:

"Mr. Taylor knew approximately what the debts were; he knew approximately the operating costs; he assumed **a** certain figure for the price of tungsten, and then he worked out the proper number of tons which would be necessary at that ten dollar market in order to make a **safe investment as against the debts.**" (pp. 575-576).

And again on cross examination he said:

"Q. And at that time you had made no representations to him, and you had never discussed with him the tonnage of the mine?

A. I certainly had not.

Q. And you saw these figures at that time, did you not?

A. Yes.

Q. And on what kind of a basis did you say Mr. Taylor was expecting to deal with others?

A. He said that if there was that quantity in the mine, the mine would be on a **banking basis.**

Q. And didn't Mr. Taylor say that he wanted the prop-

osition upon a banking basis?

A. He did not.

Q. Did he say who he was going to interest in this property?

A. He said he hoped to interest some New York Trust Company on a banking basis.

Q. On a banking basis?

A. Yes.

Q. And yet never at any time did he discuss with you, nor did you tell him what the tonnage of ore or values in that mine were?

A. I did not. (pp. 576-577).

Taylor's story is further corroborated and borne out by what transpired subsequent to their meeting in Denver.

RELIANCE—TAYLOR'S EFFORTS TO OBTAIN LOAN

According to Taylor, after the contract of April 2nd was signed, he started in to try to raise the money necessary to pay off the indebtedness. He first talked to several people in Denver, among them Mr. Henry James of the Denver National Bank; Henry Swan of Bright, Swan & Company, brokers; Mr. Moore of Dwight & Company, brokers; and particularly to Mr. David R. C. Brown, and his father, Mr. Frank M. Taylor. Mr. Brown and Mr. Taylor both said they would put up some money and then Mr. Taylor decided he would have to go East to raise the money (p. 60) He arranged with Poole to visit the mine about April 24th or 25th in order that he might be able to state in presenting the proposition that he had actually seen the mine. Mr. Taylor is not a mining engineer; never worked in a mine and never did any sampling, and never had anything to do with the active operations or examination of any mine for the purpose of testing its value (p. 62). On the other hand, Mr. Poole is a mining engineer; had long been connected

with the management and operation of this mine and was an expert in testing the value of a mine, so that Taylor considered that he had expert advice from the statements of Mr. Poole, in whom he had implicit confidence (p. 114). After this visit to the mine,Taylor left for New York to raise the necessary money, arriving there about April 30th. On the train he met Mr. Thane and they together prepared a prospectus which was to be used to submit with Mr. Bancroft's report to various people in New York and in the East who Taylor thought might be interested. He talked to a good many people in New York, among them Mr. Dodd and Mr. Buckner, Vice-President and President, respectively, of the New York Trust Company; Mr. Edwin Holter, a general mining promoter; Chisholm & Chapman, brokers; Mr. Carl Ilers; Mr. W. S. Morse, and Mr. Prosser of the American Smelting & Refining Company (p. 63). Also while in New York Taylor arranged with Mr. Jackson, his attorney, to go out to Lovelock the end of May or beginning of June for the final reports, auditors' reports, and preliminary examination as to titles. While in New York he also made arrangements to have Mr. Bancroft make a further examination of the mine. This took place about the middle of May (p. 65). Taylor then went to York, Pa., where he talked with one or two other persons about the proposition and then went West to Denver, expecting to meet Mr. Bancroft there after he had completed the examination of the mine. Before going West, however, Taylor arranged for the necessary funds and upon his arrival in Denver made further definite arrangements with reference to getting moneys for carrying out this contract. (p. 66) He arranged with Mr. F. M. Taylor for $25,000, which was paid, and also arranged with Mr. David R. C. Brown for $10,000, which was held subject to his use whenever he wanted it and needed it (p. 67). In passing upon the admissibility of the evidence in this connection, the

Court, in referring to Taylor's testimony, said:

> "He says that Mr. Taylor paid him $25,000. I think that may stand. He says also that Mr. Brown's amount was $10,000 which was subject to the witness' order. I think those facts may remain."

Taylor had cash for Mr. Taylor's $25,000 and he had sufficient cash in the bank which, added to certain bonds which he had in his possession furnished more than enough money to take care of the complete indebtedness of the company (p. 68). He had cash and immediately available about $125,000; he had in bonds salable on the New York Stock Exchange in his own possession $50,000 at least more; he had arranged with the New York Trust to borrow $40,000, signed his note for it and given security, the money to be deposited upon his telegraphic order (pp. 99-100). He had already taken care of $70,000 to $75,000 of the indebtedness, so that the indebtedness of the Mining Company at that time was between $150,000 to $175,000 (p 69). The Court, in referring to this testimony, said:

> "He states in the first place, 'I had $125,000 in cash in bank;' I can't throw that out as hearsay. He says he had bonds of $50,000 more; I can't throw that out as hearsay. * * "

This $125,000 which he had in the bank, and the $50,000 of bonds were both available for the purpose of carrying out the contract (p. 70). Taylor testified that Mr. F. M. Taylor gave him $25,000, and said:

> "If you decide to go ahead with this deal and take this stock, I will take $25,000 of it. Mr. Brown told me the same thing, only he did not give me the money; he said, 'if you need the money you may call on it.' " (pp. 71-72).

That was in Denver. Taylor later telegraphed Mr. Jackson, his attorney, to start west from New York and met

Mr. Jackson in Lovelock on Saturday, May 31st. In the meantime, while Jackson was enroute, Taylor got the first assays on Mr. Bancroft's subsequent examination which had just been made, Mr. Bancroft getting to Denver about that time. These reports were later, about May 27th, confirmed by certificates. After receiving these certificates Taylor left Denver and went to Lovelock where, as stated, he met Mr. Jackson on Saturday, May 31st. After meeting Mr. Jackson they met Poole on the street and told him what Mr. Bancroft's report was and asked him if he wished to verify it, to which he replied that he would like to. Taylor says that Poole thereupon stated that is was impossible, that Bancroft must have been mistaken, whereupon Taylor and Jackson suggested that he had better check it up himself and suggested that they go up to the mine that afternoon. Nenzel made arrangements by telephone and Mr. Jackson, Poole and Taylor went up to the mine that afternoon (p. 75). They discussed conditions with Mr. Poole. Taylor testified Mr. Poole said that if Mr. Bancroft's report was right that the foreman at the mine had lied to him, giving him wrong information and said to Taylor:

> " 'When we get up there I wish you would take Mr. Jackson, take him away from the office, as I want to spend two hours with the foreman and if I find that he has given me wrong information I will knock his block off,' or something of the kind."

Jackson and Taylor spent the afternoon around the mill and about five o'clock they got back and had supper and Mr. Poole went down the mine, taking Mr. Jackson and the foreman, Mr. Morrin, with him (p. 76). Taylor saw them about two hours later when they came out of the mine and a conversation followed between Jackson, Poole and Taylor which Taylor relates as follows:

> "As soon as they came into the office I asked Mr. Poole if Mr. Bancroft was right; he replied, 'Bancroft

is right; the foreman lied to me.' " (p. 77).

Mr. Goodin met Taylor and Jackson in the hotel at Lovelock that evening. They told him that instead of 60,000 tons developed, or over, there was less than 18,000 tons developed, that is, ore averaging 1.76 per cent or 1.75 per cent W03. Mr. Goodin was very much surprised. They told him that Poole had been up to the mine and exactly what had happened; that Poole had gone down into the mine and had come back and said that Bancroft's report was right.

WHAT OCCURRED AT MEETING IN CALIFORNIA

Early Sunday morning Taylor and Jackson left for San Francisco where during the following week they met Mr. Murrish, Mr. Jones, Mr. Poole and Mr. Nenzel (p. 78). They met them at various times during that week, mostly at the Palace Hotel; also at Mr. Thane's and Mr. Bayless' office. Taylor and Jackson arrived in San Francisco Sunday afternoon. On Monday morning they met Mr. Murrish, Mr. Jones, Mr. Nenzel and Mr. Poole at Mr. Bayless' office. At this meeting Taylor says:

> "Mr. Jackson did the talking for me as my attorney. Mr. Jackson stated to them,—gave them a general resume of the results of the examination, and asked them in the beginning to correct him if he made any misstatements; he then proceeded and said this mine was represented to contain 60,000 tons of commercial ore; the report showed that it contained less than 20,000 tons; 'my client raised money to make these loans, representing that it was—the mine had the 60,000 tons blocked out; he could not very well put his money or his friends' money into a mine that has 20,000 tons blocked out, when it was obtained to go through with one that had 60,000; we are willing, however, to rearrange the loan on a sum basis, by which my client is protected, and suggest the following proposition; to put up about——' " (p. 80).

That offer made by Jackson in Taylor's behalf was afterwards incorporated into a writing by Jackson (p. 82) and was submitted to Murrish, Poole and Nenzel (p. 83). On Friday evening there were present at Mr. Bayless' office Poole, Nenzel, Taylor, Jackson and Bayless. Poole and Nenzel at that meeting said:

> "Your proposition is satisfactory; Mr. Murrish does not care to make any changes in it; it will be submitted to the creditors tomorrow morning for their approval; we will ask them to accept it; we are convinced that is the best proposition that can be done, that we can get, and under the circumstances it is perfectly fair. We thank you for making it." (p. 86)

TAYLOR READY, WILLING AND ABLE TO PERFORM

At that time, Mr. Taylor testifies, he was ready, able and willing to perform the conditions which were outlined in that paper (p. 87). Mr. F. M. Taylor gave him the $25,000; Brown, instead of giving him the $10,000 said, "You can have it whenever you need it." Taylor had $80,000 in cash in the New York Trust Company of his own property on the 31st day of May or the 1st of June. He also had an arrangement with the New York Trust Company to borrow $40,000, subject to his call; the notes were signed; the security attached; the notes were in the possession of the New York Trust Company; they were to be deposited to his credit any time he telegraphed them to do so (p. 99). He also had various other stocks which were salable on the New York Stock Exchange any moment and could have been converted into probably $90,000 cash, in addition to the $80,000 cash, and $40,000 loan arranged.

CORROBORATED BY BAYLESS

Mr. W. S. Bayless, who is a lawyer in San Francisco and who was representing Mr. Taylor in San Francisco in ref-

erence to matters concerning the title of this property, corroborates Mr. Taylor's statements as to what occurred in San Francisco at the meeting at his office on Monday morning, June 2nd. He testifies that Mr. Jackson made a statement, the substance of which was this:

> "Mr. Jackson announced to those gentlemen mentioned that he represented Mr. Taylor; that he had come from New York and had met Mr. Taylor for the purpose of closing this up for Mr. Taylor; that in view of the fact that the mine was not as represented, it was impossible for Mr. Taylor to take up his option, however, Mr. Taylor was willing to take over the property on some different terms, that is, he would like to modify the option in some equitable way, and would like to discuss that proposition with them; he further mentioned that Mr. Taylor had performed all the services he had said he would perform in order to receive the compensation allowed him in this option, and was there for the purpose of making some different arrangement if it could be agreed upon." (p. 128).

He states further that according to his recollection Mr. Taylor was willing to advance about $75,000 in place of $160,000 which the debts amounted to, the $75,000 to be used to pay the company's obligations under $500, and to be pro rated among the creditors whose claims exceeded that amount; that he was also willing to advance about $10,000 to be used as working capital, and for that he expected to receive 62 per cent. of the common stock of the company, to be formed to operate the mine, and to have a lien on the ore blocked out as security for these advances; also the right to operate the mill of the Products Company during the period this arrangement was in force; also, that if that arrangement met with the approval of the company, the mine was to be operated and if the operations developed sufficient commercial ore to justify it, Taylor would advance them the further sum of about $65,000., which would be used then to pay off all the creditors (p. 130). Bayless

states (p. 130):

> "Mr. Poole, I think, was the spokesman and from time to time as Mr. Jackson proceeded with the statement of fact, he would say, 'now if I am wrong I wish you gentlemen would correct me,' particularly regarding these representations or misrepresentations; and Mr. Jackson would say, 'Well, now, is not that so Mr. Poole,' and on a number of occasions Mr. Poole would say, 'Yes, that is so,' and he would speak to the other men present and ask them if that wasn't so, and they never directly replied except by nodding their heads to its being so."

Bayless says they had frequent conferences for the purpose of discussing the new arrangement and finally Mr. Jackson drew up a contract. The terms were verbally agreed upon about Wednesday. Then there was the question of reducing the verbal agreement to writing. Some suggested Mr. Murrish draw up the contract; he suggested Bayless, and Bayless suggested Jackson. Finally everybody was willing for Mr. Jackson to draw the contract, which he did, and deliver the contract to one of these gentlemen some time on Friday. They looked over the contract and it was agreed to meet in Mr. Bayless' office Friday evening. Jackson, Taylor, Poole and Nenzel met Bayless at his office Friday evening. Jackson asked Poole what he thought of the contract. Mr. Poole said he had no changes to make, that it was a hard bargain from their point of view, but in view of the existing conditions they could do no better; they were satisfied with the contract, had no modifications or suggestions to offer. Mr. Jackson told them not to hesitate to suggest changes because the draft he had submitted was merely a tentative draft and that he himself had a number of suggestions that he would like to make. Poole said:

> "That is all right. We will make the contract as it

stands, provided our creditors will permit us to sign it."

He said:

"We have called a meeting of the creditors, as you know; the creditors will meet on Saturday morning, tomorrow morning. We will ask the creditors to approve of this contract; if they do, we will sign it up."

Bayless' recollection is that they then all shook hands and dispersed to meet following the creditors' meeting the next day. Taylor and Jackson were not invited to be present at the creditors' meeting, but Bayless was present, not as a representative of Mr. Taylor, but as the representative of one of the creditors, a Mr. Pettigrew. Poole, Nenzel, Murrish and Goodin were all present at the creditors' meeting. In response to the question as to whether Poole, Murrish, Nenzel or Goodin asked the creditors to enter into this contract or approve it, Bayless testified they asked the creditors, in substance, to extend payment of their indebtedness for their various claims, saying that if the creditors would give them time, they could work the mine, pay off all the claims in full, and they would not be under the necessity of making this contract with Mr. Taylor (p. 133).

TESTIMONY OF BANCROFT

Upon the examination of Mr. Howland Bancroft, attorneys for defendants admitted the ability, character and expert standing of the witness. He testified that he was a mining geologist, by training, and valuer and examiner of mining property and metalliferous deposits, by experience. (pp. 228-229). He identified Plaintiff's Exhibit 15 as the original report made by him and said that the examination was made between the 17th and the 27th of January, 1919 (p. 233). He stated that it was a correct

statement of the condition of the mine at that time (p. 235). In explanation of the photostat, Bancroft states that the samples are all indicated by arrows. The arrow points to the point from which the sample was taken. The first figure below the arrow-head is the width of the sample taken; the second figure is the percentage of tungstic trioxide; and that is the same throughout the report. The blocks of ore which are here designated, are included between these dotted lines; (p. 237) the material within these blocks is commercial ore, which has been valued and the tabulation which occurs in this report, the method of calculation is the method which is followed in good practice on such an ore body. Mr. Bancroft testified that after he made this report, Exhibit 15, he made another further examination of the mine on about May 16th or 17th, which occupied about a week (p. 238). The condition of the mine, as at his second report, is illustrated by plate 5A, which shows extent of all the ore bodies and assay values as at his examination of May (p. 240). While making his first examination in January, Bancroft discussed the development plan of the mine with Mr. Poole and Mr. Morrin. The development program proposed is indicated in his report on page 10 thereof, which contemplated sinking the shaft an additional 360 feet, continuing level No. 2, driving levels 3, 4, 5 and 6 380 feet to the Southwest and 250 feet to the Northwest, and connecting these levels by raises (pp. 248-49).

Taylor testifies (p. 400) that he made the statement in the prospectus that "the result is now an assured minimum of 43,000 tons of ore," instead of stating that there were 60,000 tons as he believed, because his calculations at that time that 43,000 tons was all the ore that was necessary to have in any tungsten mine subject to the costs it would take to get it out to protect a loan of $150,000 or $160,000 and he wanted to be conservative so that in case any examination was made by any buyers he preferred to have them

be agreeably surprised when they saw the mine, instead of checking up another way and be disappointed, and 43,000 tons was all that was necessary to secure the loan. Mr. Taylor's story as to the representations made to him in regard to the tonnage and development of the mine and as to what occurred at Lovelock and at the mine on May 31st and as to the following meetings of the parties in San Francisco, is fully corroborated by the testimony of Mr. Jackson.

Mr. Jackson in substance testified as follows: that he is a practicing lawyer in the City of New York; that Mr. Taylor consulted him in May, 1919, about the contracts involved in this suit and in a general way discussed what he was doing to fulfill his undertaking (p. 411); that they had a preliminary discussion after he was employed professionally by Mr. Taylor to go out to Nevada and participate in the reorganization of the existing company or in the organization of a new company, as might seem best; look into the titles and the usual matters connected with such issues of stock; attend to the issuing of the stock and generally to see that the whole situation was in order from the point of view of a New York business man or investor. Mr. Taylor agreed to pay his firm a fee of $5,000, and expenses for the trip. This was about May 5th or 6th (p. 412). That on May 14th a telegram was dictated in his office by a Mr. Thane requesting Bancroft to make an examination of the mine; that his arrangement with Taylor was made prior to that time, subject, however, to the approval of Mr. Thane, which was obtained on the 14th day of May. At that time Mr. Thane stated that he would like to have Mr. Bayless also assist in the examination and do some preliminary work. Accordingly, telegrams were sent both to Mr. Bayless and to Mr. Bancroft; $2500 of said fee has been paid to him and that owing to the unfortunate outcome of the affair he had no intention of asking for any more (p. 413). He left New York intending to go directly

to San Francisco and there take up with Mr. Bayless the work he had done, on the understanding that all of the corporate records and papers would be in San Francisco. Enroute he received a telegram from Mr. Taylor to stop at Lovelock and go into matters there, which he did, and arrived at Lovelock on Thursday, May 29th. Mr. Taylor did not arrive there until the following Saturday, May 31st. In the meantime, Mr. Jackson met Nenzel, Murrish and Jones at the office of the company. Mr. Poole did not arrive there until Saturday morning (p. 414). While in Lovelock awaiting the arrival of Taylor and Poole, Mr. Jackson examined the corporation records and contracts of the company; discussed at considerable length certain features of the situation with Mr. Murrish; checked the corporate activities and corporate history of the three companies with the requirements of the law of Nevada and also certain questions which then presented themselves to him with Mr. Murrish at length. They had a number of conversations with regard to the legal aspects of the situation. He also ascertained the organization of the company; its officers and directors, and one or two other questions were taken up also, such as the survey. These conversations took place on Thursday and Friday, the 29th and 30th of May. He did not discuss at any great length the proposed reorganization of the present company at that time (p. 415). On Saturday, May 31st, he, Taylor and Poole left Lovelock and went up to the mine (p. 416). While in Lovelock, before going to the mine, Jackson and Taylor had a conversation with Poole. Mr. Jackson testifies:

> "The conversation in Lovelock, when Mr. Poole, Mr. Taylor and myself met, the discussion as I recollect was on the sidewalk; we walked up and down for quite a while, discussing the situation. Mr. Taylor said first to Mr. Poole that Mr. Bancroft had reported something less than 20,000 tons of commercial ore in

the mine; Mr. Taylor was very much upset because he had started for New ork sometime ago prepared to close the deal, and Mr. Bancroft's report had come along and he was extremely disappointed.

"This is what Mr. Taylor said. Mr. Poole said he, too, was very much surprised; I can't say exactly his words, don't pretend to, but the substance of it was that he could hardly believe it. We then agreed the best thing to do was to go up to the mine and see what was the best thing to be done. We took the train and went up to the mine; on the railroad this conversation was discussed with some detail as to various parts in the mine; I am not sufficiently familiar with mining to have that impressed on my mind at all." (pp. 417-418.)

After they reached the mine Mr. Jackson went down in the mine with Mr. Poole and Mr. Morrin, the superintendent, and understood from Mr. Poole that he had been taken through the whole mine. While down in the mine Poole and Morrin went through some operation called panning. They took quite a good many pannings and they were down in the mine between two and three hours (417-418). They met Mr. Taylor just outside of the mine and went immediately into the mine office, Mr. Taylor came up and said, "Well, what about it?" Mr. Poole said, "Bancroft is right; the foreman lied to me." Shortly after that they took the train back to Lovelock. Mr. Jackson testifies:

"We got back to Lovelock late in the evening and we met Mr. Goodin at a hotel. I think it is the Big Meadows Hotel, and had a conversation with him. The situation was stated to him just as Mr. Taylor had told it to Mr. Poole with regard to representations made in April, that there were 60,000 tons of ore; that Bancroft now reported only 20,000 tons of commercial ore; that Mr. Taylor had proceeded to raise this money on the understanding that this was in effect a banking proposition and the value of the ore disclosed would secure the money advanced; that under the circumstances as they now existed, according to Mr. Bancroft's report, Mr. Taylor could not put his money in that business in any other way than

on the basis on which it had been raised.

"Mr. Goodin used some rather strong language, and he seemed considerably upset, too; as I recollect, he said something to the effect that he had been more or less fooled, too." (p. 419.)

Pursuant to arrangement made in the morning, Poole, Nenzel, Murrish, Taylor and Jackson planned to go to San Francisco that night. Taylor and Jackson wanted to go to San Francisco because they felt that it would be possible, with the co-operation of creditors, to make a deal on substantially the same lines of the April 2nd contract with the advances pro rated to the condition of the mine as disclosed by Mr. Bancroft. There was nothing more that could be done in Lovelock and it seemed that San Francisco was a better place to negotiate (p. 420). Mr. Poole had been told the situation and he had been told of course under such conditions, as they were then, Mr. Taylor could not pay over the full $150,000. That was discussed on the way back from the mine to Lovelock. As to the proposition of advancing money to the company which would pay a substantial dividend to the creditors, and which would be secured by the amount of ore actually blocked out, Mr. Jackson says that he is not sure whether on the train the exact amount was discussed or not, but thinks it was, and thinks the amount then mentioned was $75,000. The parties then went on to San Francisco and arrived there Sunday afternoon. The first conference was the following day, Monday, which was June 2nd. The meeting was at the office of Mr. Bayless and those present at this first conference were Taylor, Bayless, Poole, Nenzel, Jones and Murrish (p. 422). At that conference Jackson acted as the spokesman for Mr. Taylor and when they were all in Bayless' office he said:

"That in view of the developments in connection with the mine it seemed to me in order to state the full history of the case and the full facts of the situation, in order to see if some fair deal could not be

reached; and in order to be sure that we were proceeding on common ground I wanted to state to the gentlemen who were representing the mine and the stockholders what my understanding of the facts was; and I said that I would like to be corrected if I went wrong at any time in their judgment during the course of my statement. With that preliminary, I went back, as I recollect now, to the January contracts; I said that Mr. Taylor had then made two contracts, one with the stockholders and one with the company; the contract with the company provided for the advance of money against concentrates for the purpose of more or less financing the company at a time when the tungsten market was bad and permitting them to gradually liquidate some debts and develop the property; that as a part consideration for this contract stockholders had given to Mr. Taylor an option to buy the mine for $500,000.

"It was not all the stock. It was so much a share which in the aggregate would fix the value of the stock at $500,000; there were a few shares these gentlemen didn't pretend to control; following the making of these contracts Mr. Taylor had found it impossible to interest people in the purchase of this stock at the price and accordingly they had met in his office in Denver. There, after considerable negotiation, a new contract, dated April 2nd, had been entered into; prior to executing that contract, and as a reason for entering into it, Mr. Poole had represented to Mr. Taylor that the mine contained 60,000 tons of commercial ore; it now developed that that representation was a mistake; Mr. Bancroft had just examined the mine, had reported that there were but 20,000 tons of commercial ore in the mine; that under those circumstances, while Mr. Taylor had come West from New York with the money to close the deal, and expected to close it, he now could not put into this company's treasury to pay its debt, or for any other purpose, the money which he had in part raised himself and in part from his friends on one basis, whereas there had now developed an entirely different condition of affairs. I continued to say that, nevertheless, in spite of this situation, Mr. Taylor was very much interested in this mine, and that he would like to work out with them an equitable and fair deal, which would be substantially on the same basis an deven more fa-

vorable to the company than the basis set forth in the April contract. I was authorized to offer to the company an advance of $75,000, to be secured by concentrates and in addition to that—I am not sure whether it was in the first interview but certainly was later, Mr. Taylor authorized an additional advance of $10,000 to be used as working capital. I also said that some arrangements would have to be made with the creditors so that to the extent that this $75,000 did not pay them all they would not interfere with Mr. Taylor's security; that he was entitled to work his money out of the ore blocked out as certified by Mr. Bancroft; and that when an additional 20,000 tons of ore were blocked out he would advance the balance of the money to pay off the rest of the creditors. The suggestion then made was that all creditors whose claims were $500 or less be paid off in full, and that the remaining creditors be paid pro rata. It figured at dividends, as I recollect, of about 45 per cent to all of the other creditors and excluded Mr. Taylor, who was a secured creditor. On Tuesday I think we had no meeting. The matters were under consideration; and on Wednesday we had one or two meetings; there were various details discussed of one kind or another. I recollect that among the matters discussed was the personnel of the board of directors and the officers of the company.

My recollection is—I am certain as to the fact, but could not swear whether it was Wednesday or Thursday morning, we came to an agreement that a new company was to be organized and to issue preferred stock—not preferred stock, but to issue bonds for the amount of its claims. Mr. Taylor agreed to buy $85,000 worth of these bonds; $75,000 was to be applied in payment of the claims, and $10,000 was to remain as working capital; the personnel of the company, of the directors and managers, was agreed upon; my recollection is that Mr. Taylor was to be president; Mr. Thane was to be the engineer or supervisor in charge of operations—consulting engineer; and Mr. Poole was to be in charge of operations at the mine; I think one director was to be agreed upon by the creditors and the fourth I have forgotten. I don't remember who it was. That, in outline, is the proposition; it was agreed upon and accepted by all concerned, and then the discussion came up as to who should em-

body this in writing; it was suggested variously, Mr. Poole, Mr. Murrish or myself should draw the contract. Finally it was put up to me and I said I would with the understanding that what I prepared would be a tentative draft, subject to revision; it seems to me we were all agreed on the substance of the proposal and the nature of Mr. Taylor's security, and I would prepare a draft on that understanding; and from that point of view; I went back to my room at the hotel, wrote it out in long hand, then gave it to the hotel stenographer, who wrote it out, and it was put, I think two copies, certainly one copy and I think two copies, in the mail box of the representatives of the Nevada Company or the stockholders of the Nevada Humboldt Company. According to the appointment previously made, we met in Mr. Bayless' office at 7:30 on Friday night to discuss this contract and make any revisions that seemed advisable; those present at the time were Mr. Poole and Mr. Nenzel. M.r Murrish and Mr. Jones were not present. Mr. Poole said that Mr. Murrish did not care to make any changes in the contract; that it was satisfactory; that they would submit it to the creditors at a meeting which they called for tomorrow and would recommend and urge its acceptance. That was as satisfactory as we could hope or expect from any point of view and the meeting then adjourned. Following it the creditors' meeting was held; Mr. Taylor and I were not permitted to attend until the very end of the meeting; it was just before lunch time that we went over to the meeting at the office of some engineers, Frietag & Ainsworth, I think it was. We found it impossible to do anything with the gentlemen present for several reasons; in the first place—I am not permitted to say the reasons I suppose. I think that about concludes.

Mr. Jackson further testifies at page 428 as to the interview on Monday, June 2nd, that

> "during the course of the conversation as I made statements or concluded a statement of fact, in regard to the history of this matter, I would ask the gentlemen from time to time whether that was correct; I would say, 'Is that correct?' and at no time during that meeting was a statement contradicted; and in several instances Mr. Poole acquiesced by nodding his head or

saying, 'Yes, that is so.' That is particularly true, I would like to say, with regard to the representation, as to the quantity of commercial ore, in the mine, because I had that especially in my mind when I made the statement to see whether it was admitted or whether it was not admitted; I have a very distinct recollection of it."

On cross-examination, no questions were asked of Mr. Jackson regarding the story told by him as to what transpired either at the meetings in Lovelock at the mine or in San Francisco, and his testimony stands unshaken. His testimony as to the admissions regarding the representations as to tonnage and commercial ore is clear and positive, and, we submit, entitled to a great deal of weight.

POOLE'S TESTIMONY

Poole testifies that he met Taylor and Jackson in the month of May and that he, Jackson and Morrin went down in the mine; that they visited the third level North and the shaft all the way down, particularly the part of the shaft between the fourth and fifth levels, and not any other portion of the mine that he recalls, but that he may have gone into the third level South and they may have gone up on the second level South, where there was some water; but they were visiting particularly the shaft between the fourth and fifth levels and the third level North from the main shaft; that he and Morrin did considerable panning in the presence of Mr. Jackson (p. 500); that he did not at that time make any attempt to measure up the tonnage that was in the mine; that before going to the mine Mr. Taylor had shown him a map which purported to show assays which Bancroft had gotten at his second examination and they were all very low; the map was on tracing paper and was drawn with a red pencil and had assays on it on the third level North and on the shaft between the fourth and fifth level; these assays were all very low and

that when they got to the mine he took this map and showed it to the mine foreman and said, "There's part of what Mr. Bancroft has found in his mine at his second examination." This, he testified, was said in the presence of Taylor and Jackson and that the foreman looked at the map and said:

> "I don't care what Bancroft says, there is ore in that third level North and there is ore in the bottom of the shaft,"

and he said,

> "If you will come down in the mine I will prove it to you."

That they went down in the mine with that point in mind, because from the conversation he had with Mr. Taylor he didn't know whether these were Bancroft's assays or what they were, and he thought that if they were Bancroft's assays it would be very easy to check them up by panning; that is, one can have some idea as to what the mine is by assays or as to whether there is some ore in it (p. 505; that on the third level they found good ore and bad ore; at different places the ore was spotted; there were spots of bad and spots of good; that Mr. Taylor told him that the assays represented upon the map were Bancroft's assays; that they were assays of the samples taken by Bancroft at his second examination (p. 506); in the bottom of the shaft on the North side they found very good ore; on the south side they found low grade ore; we would not say it was ore at all; it was simply a low grade vein. Mr. Taylor said he was not interested in any panning and that he was going to abide by Mr. Bancroft's report. He denies that he stated in the course of that conversation in substance or effect either to Mr. Jackson or Mr. Taylor, or in the presence of either of them, that Mr. Bancroft's report on the tonnage of that mine was right. He denies that there was any discussion as to tonnage in the mine (p. 509); de-

nies that on that occasion they made any investigation of the tonnage in the mine. He states that he had not intermediately between that occasion and April 2nd made any investigation of the tonnage in the mine. He denies that he ever either at the mine or in Lovelock at the company's office or elsewhere in the State of Nevada said anything in substance or effect that he had represented to Mr. Taylor that there were 60,000 tons or at least 60,000 tons or any number of tons whatever of ore in the mine belonging to the Tungsten Company (p. 510). He denies that he ever silently acquiesced in any statement made in his presence to the effect that he had represented to Taylor that there were 60,000 tons of ore in the mine belonging to the Tungsten Company, but says:

> "Well, there may have been some mention of tonnage in that conversation in San Francisco, I can't be positive about it. I don't recall it myself but my associates say that something like that took place." (p. 511.)

He says he doesn't even remember that "tonnage" was mentioned in this conversation, yet he denies that he assented either orally or with a nod of his head or with the phrase, "Yes, that is so," or otherwise, to any statement made by Mr. Jackson in his presence, alleged to have been made by him to Taylor in substance or to the effect that the mine of the Tungsten Company contained 60,000 tons of commercial ore (p. 512). He testifies that Taylor told him he didn't place any great reliance in Mr. Morrin because Mr. Bancroft had so reported that Mr. Morrin was not very reliable and he didn't like him (p. 513); that he told Mr. Taylor that these were Morrin's estimates and he could take them for what they were worth; that Mr. Taylor said he was going to absolutely rely on Mr. Bancroft; that while he didn't like him as a man he certainly admired him as a technician (p. 514). At page 515, Poole testifies:

"Well, when I made the representation as to distance and assays, and the explanations accompanying them, I told Mr. Taylor, I said, 'I will vouch for these distances, because Mr. Huntington is an accurate surveyor, but I won't vouch for these estimates on here as having any meaning,' and I said, 'I want you to get that clearly in mind, because I don't want to make any misrepresentations to you,' and he says, 'The only effect that any misrepresentation on your part would have on me would be to cause me to lose confidence in you and therefore I would not use you as superintendent of the property." (p. 516.)

On page 520 he says:

"Those were the distances which I had given him in Denver, as new data since Bancroft's report in January."

He says that when he, Taylor and Morrin went down in the mine about the middle of April they took 100 pannings (p. 520). On cross-examination he said they might not have taken more than 25 or 30 pannings (p. 594). According to his testimony (p. 520) he says they were in the mine about four hours. It would have been impossible to have taken 100 pannings in that time. In the latter part of May, when Poole, Taylor and Jackson went down in the mine, Poole says that Taylor stayed on top and didn't go down in the mine because he said he wasn't interested; he had Bancroft's report and he was going to stand on it (p. 522). That at Lovelock just before starting for the mine he had a conversation with Mr. Taylor and Mr. Jackson in reference to the Bancroft report not being favorable; that he met Taylor and Jackson on the street and that

"Mr. Taylor's first words to me, as I recall it, were 'Bancroft's report is unfavorable,' and I said, 'What?' He said, 'Yes, his report is unfavorable.' 'Well,' I said, 'how do you reconcile that with the telegram that you sent me that it was favorable?' 'Well,' he says,

'his first report was a preliminary estimate of tonnage and he didn't have his assays and the tonnage report was favorable.' 'Well,' I said, 'how do you reconcile it with the telegram you sent to Thane?' Thane had given me a copy of that in which he reported 40,000 tons. I told him I didn't think Bancroft would make an exact statement of 40,000 tons. I don't recall any answer that Mr. Taylor ever made to that." (p. 523.)

He denies that in that conversation or any conversation that he had with Taylor in the presence of Jackson or otherwise at this time in Lovelock was anything said with regard to Morrin having lied to him. Poole testifies that he said:

"Taylor, it occurs to me you are lying about these things; have you got the money to go through with this deal?' and then is when he told me he expected to put so much money in himself and so much money his father intended to put in and so much Brown would put in, but that Mr. Brown and Mr. Brunton would probably visit the property." (p. 524.)

Is it reasonable to suppose that Poole, on whom Taylor was relying and who was to be appointed superintendent of the mine in the event of the deal going through would address such language to Taylor? On cross-examination Poole testified that he had been acting as the manager or superintendent of mines for sixteen or seventeen years (p. 529); during that period was connected with various mines (p. 530), several of which were controlled by Mr. Friedman. Up until January 31, 1918, by virtue of a contract that he had with Mr. Friedman, he acted as consulting engineer for the Tungsten Company (p. 531). Poole examined and approved Bancroft's plan of development of the mine and discussed it with the directors and officers of the company, and also in great detail with Mr. Morrin, the superintendent of the mine (pp. 532-33). Poole was at Tonopah when he received a telegram from either Murrish, Nenzel or Friedman informing him that Taylor was coming to visit the mine and asking him to return home

(p. 536). At page 595 the Court, in referring to the time when Poole went down in the mine with Taylor on April 9th and took the numerous pannings, asked Poole:

> "Did I understand you to say you did any measuring at that time? A. Yes, I had been very cautious in Denver as to the representations I made to Mr. Taylor and one of the things I had vouched for was that the development work as shown on that map, had been done; I said, 'Mr. Taylor, I am positive of that' and I wanted to keep Mr. Taylor's confidence because I expected to be superintendent of that property if Mr. Taylor went through with this thing."

Nenzel in his testimony recalls trip to San Francisco latter part of May or first part of June, 1919, at which he met Mr. Jackson. He states he first saw Mr. Jackson on Monday, June 2nd, 1919, in Mr. Bayless' office. In response to a question as to what in substance and effect Mr. Jackson said in his presence on that day, he replied:

> "Well, he said that we had represented there were 60,000 tons of ore in the mine while we were at Denver and that Mr. Bancroft's report only shows 19,000, and that, therefore, they wanted to make a modified agreement with us."

Denies that he nodded his assent thereto and states that he did not orally express assent thereto or do anything whatsoever to indicate his assent thereto, and that he did not assent to that statement (p. 610). Says he remained silent on the occasion when that statement was made by Mr. Jackson (p. 611). Testifies that he and his associates agreed not to say a word but to hear Mr. Taylor's proposition. Testifies that Mr. Jackson again referred to the same matter that afternoon and that Jackson said that they had consented through silence; that Jones, Poole, Murrish, himself, Taylor and Bayless were present at the time. Nenzel says that he told Jackson that he did not consent by silence and that he told him he did not under-

stand his words when he used that foreign language which he used, referring to the term "acquiescence" used by Mr. Jackson (p. 612); also testifies that Murrish said he did not consent by being silent; does not believe Jones said anything and that Poole said he did not make such a representation (p. 613).

Murrish testifies that he was in San Francisco the early part of June, 1919; that on that occasion he had conversations with Taylor or Jackson in the presence of Taylor; that he met Jackson and Taylor in the office of Bayless on Monday morning, June 2nd (p. 633), in company with Mr. Nenzel, Mr. Poole and Mr. Jones; that they went there pursuant to an engagement that they had previously made with them and Mr. Taylor told them that Mr. Jackson would speak for him. He says:

> "Mr. Jackson opened the conversation by stating that 'you people told Mr. Taylor in Denver that there was 60,000 tons of ore in the mine, now Mr. Bancroft reports that there are only 19,000 tons there. So Mr. Taylor does not feel justified in putting the money of his friends into this proposition on the basis of th present contract, and he will have it modified.' 'Now,' he said, 'we are willing to put up $75,000. to pay creditors and we will pay the rest of the debts as soon as the ore is developed that you stated was in the mine.' "

On that occasion when that statement was made by Jackson, Murrish says he did nothing, did not nod his assent and did not express his assent thereto (p. 634). He says that he and his associates had agreed before going to the meeting that there would be no discussion of any matter on their part; that they would simply listen to Mr. Taylor's proposition and retire and consider it, returning later to discuss the matter with him. Murrish testifies that on Monday afternoon Mr. Jackson again started a conversation. He says: (p. 535)

"I don't recall whether he said you admitted or you stated to our folks, stated that there was 60,000 tons of ore in the mine; and I then took issue with Mr. Jackson; and I said, 'I made no such statement as that', and he said, 'Yes you did.' He says 'your silence was assent', and I said, 'my silence was not assent in that case because I never made such a statement' and the minute I finished Mr. Nenzel got up and he said, 'I never made such a statement as that either,' he says, 'I don't understand your terms, but' he says, 'I never made such remark as that'; and while Mr. Nenzel was still talking Mr. Poole got up and he started in a gentlemanly manner to enter into a discussion."

Murrish further testifies that Poole said he had never made any such statement as that to Mr. Taylor, that there were 60,000 tons of ore in the mine. The discussion then followed about the modified form of contract and Murrish testifies that he stated it would be absolutely impossible for them to agree to any modification if it did not arrange for the payment of all of their debts. That, as he recalls it, that was all there was to it. They argued this modification they wanted and he and his associates argued that they could not consider anything that did not pay all of their debts. They again met on the following morning, which was Tuesday (p. 636). The first thing he recalls at that meeting is that

"The first thing Mr. Nenzel used as argument was that if they only paid $75,000 worth of our debts we would have no money to operate the mine, and it was preposterous to consider such a proposition; then Mr. Taylor said under those circumstances he would advance an additional $10,000. to work the mine, and Mr. Jackson, as I remember, had that morning a sheet of paper on which he had the modifications that he wanted us to assent to." (p. 637).

The document which he testified Mr. Jackson had on Tuesday morning, on which he had the modifications that he wanted them to assent to, was identified by Murrish as defendant's Exhibit Z. He testifies that this paper was

used during the discussion and upon the termination of the discussion that Mr. Nenzel took it away with him on the day of that meeting on Tuesday (p. 638). On cross-examination Mr. Murrish testified with great particularity and positiveness that this document, including even certain corrections, constituted the first proposition which was presented at the meeting on Tuesday, June 3rd. Mr. Thatcher testified that this document, which Murrish was so sure had been presented at the meeting in San Francisco, on June 3rd, was, as a matter of fact, prepared some few months later at Mr. Thatcher's office at Reno and that the pencil notations and alterations thereon were in the handwriting and made by Thatcher; that at the time of the meeting in San Francisco the document was not in existence. Counsel for Defendants were obliged to admit that Murrish testified falsely that this document was presented by Mr. Jackson in San Francisco and constituted the first proposition for a modified contract submitted by Jackson. Mr. Jackson also in his testimony denied having prepared or presented any such document, as testified by Murrish. Murrish denies that he agreed at any time prior to the meeting of the creditors which was held on Saturday that he would advocate the adoption of the proposed modified agreement at the creditors' meeting (p. 643). He states that he called the meeting of the creditors to order and stated briefly the object of the meeting; that they were indebted in a large sum of money to them and that their indebtedness was rapidly maturing and that they were anxious to pay their debts or to secure the creditors in the payment and that they were dealing with Mr. Taylor, who had submitted a proposition to them concerning the mine, but that they felt they were in the hands of their creditors, if not legally, they were morally. The property was theirs and they would be governed wholly by whatever action they took at the meeting; that he then told them that Mr. Poole would address them on the state

of their affairs and the chances and the likelihood of their liquidating their debts; that Mr. Poole made such statement, after which he read the proposed contract with the addenda, that is, Exhibit 17, and the addenda, Exhibit A-1. That when he had gotten part way through this proposed contract, Edson Adams, one of the creditors, said, "we have heard enough of that." Several of the other creditors, however, said, "Oh, let's hear it all; let him finish it," and so he completed reading the proposed contract with the addenda, after which there ensued a general discussion (pp. 644,645). He states that at that meeting not a single creditor assented to the contract, Exhibit 17, as modified by Exhibit A-1; that they did not agree to the execution of that contract with the addenda. He states, however, that if their creditors insisted on their signing it they would, but that was the only condition (p. 646).

Thus, it will be seen from the foregoing testimony that Mr. Jackson stated at the meeting in San Francisco at which Poole, Murrish, Nenzel and Jones were present, that they had stated to Taylor in Denver that this mine contained 60,000 tons and that Mr. Bancroft's report showed it contained only 19,000 tons. Nenzel and Murrish admit that Jackson made this statement to them at the first meeting on Monday morning, and again referred to it at a meeting which they had on Monday afternoon, and say that they remained silent; they further testify that Mr. Jackson on the following day stated to them that they had admitted those facts were true by their acquiescence and that in response to this statement by Jackson, Murrish testifies that he got up and said,

> "I don't acquiesce. I never made any such statement, and I don't want my silence to be taken as acquiescence."

Mr. Nenzel also testifies that he had made no such representation and had not admitted the facts stated by Mr. Jackson by his silence and acquiescence. Poole, however,

does not testify as to this, because Poole says that he does not even remember any conversation taking place as to tonnages in San Francisco, but that there probably was, inasmuch as his associates state that there was such a conversation. Poole is the very person who made the representations as to the tonnage and it will be noted that he is the one who seeks to escape the effect of his admissions to the statements regarding tonnage made by Mr. Jackson in San Francisco, by testifying that he has no recollection of any conversation at which the subject of tonnages was mentioned, and he is the very person who Mr. Jackson states positively admitted the correctness of these statements by word of mouth, as well as by nodding his head at the time the statements were made by Mr. Jackson. There is no conflict between the testimony of Mr. Murrish and Mr. Jackson as to Murrish having said to Mr. Jackson that he individually had not made any such representations as to tonnage, except that Murrish claims that he made this statement at the meeting, whereas Jackson testifies that Murrish did not make this statement until they were leaving the meeting and then off at one side, in an effort to relieve himself personally from any responsibility for having made any such representations which had turned out to be false. Taylor, Bayless and Jackson all deny that Poole, Murrish or Nenzel ever got up in the meeting and said that they didn't admit these things by failing to deny them. Jackson further testifies that the only statement of that kind made by any of them was the statement above referred to, which was made by Murrish to Jackson as one of the meetings was adjourning. According to the testimony of all parties, Mr. Taylor stated at that time that he was willing to put up $85,000, $75,000 to be applied pro rata to the creditors and $10,000 to be used as working capital, and that he would put up additional money for the payment of the balance of the creditors as rapidly as new ore was developed. Mr. Mur-

rish testified, and there is no dispute about it, that Mr. Jackson said on behalf of Mr. Taylor after they presented a form of contract, "you can make any modifications or alterations or changes that may be advisable or necessary," opening up the door at all times for anything which would be fair, just and equitable in the light of the circumstances as then found to exist; and that they did exist in fact is undisputed, because Mr. Bancroft's report—the second report—stands undenied and uncontradicted, that the commercial ore in the mine was 19,800 tons and no more.

Jackson's testimony is that they accepted the proposition and that they stated they would endeavor to have the creditors accept it. Murrish's testimony is that they didn't accept it; that he wanted the proposition as presented to the creditors to be Taylor's, and Taylor's only. He admits and they all admit that they didn't recommend it to the creditors and did not ask the creditors to consent to the contract or make any endeavor to have the creditors join in the contract or consent to it or put it through, or suggest it was tentative and could be modified. The creditors' meeting was held and nothing came of it, as far as any acceptance of the contract is concerned, and that ended the negotiations as between the parties.

At the meeting in San Francisco, Murrish testified:

> "I asked Mr. Taylor this question; I said, 'Are you going to exercise your option of April 2nd?' He said, 'Yes, by paying $75,000 of the debts and paying the rest when the mine is developed.' Then I said, 'You are not going to exercise your option,' and he said, 'Yes, by paying $75,000 of the debts and paying the rest when the mine is developed', and I repeated, 'Then you are not going to exercise your option. He said 'Yes, by paying $75,000 on the debts and the balance when the mine is developed.' "

Analyzing the foregoing testimony of the several witnesses as to what occurred at the meeting in California, we

have the undisputed facts (a) that at the first meeting at which Poole, Nenzel, Murrish and Jones were present Mr. Jackson stated that they had represented to Taylor that there was a tonnage of 60,000 tons and that Mr. Bancroft's report showed that it contained only 19,000 tons; that Mr. Taylor did not feel justified in putting the money of his associates, and himself into the proposition on the basis of the existing contract and that it would have to be modified; Nenzel and Murrish admit this, and Poole says he has no recollection of it but that so long as his associates state that Jackson made such a statement, perhaps he did; (b) that Taylor made a new proposition based on Bancroft's report and offered to make a loan of $75,000 to be paid to the creditors and $10,000 additional for working capital and offered to make further advances up to the amount of the original proposition as and when further ore might be developed; (c) that Poole, Nenzel and Murrish made no effort to induce the creditors to accept the modified proposition of Taylor.

There is a dispute as to what Poole, Nenzel, Murrish and Jones said and did at the first meeting when Jackson made the above statement as to the discrepancy in the tonnage as represented and shown by Bancroft's report. Jackson, Taylor and Bayless testify that Poole said, "that is so" or "that is correct," and that Nenzel evidenced his assent by nodding his head. On the other hand, Poole, Nenzel and Murrish testify that they all remained silent pursuant to a pre-arranged understanding that they would not discuss any matters at this meeting, which was called for the purpose of discussion. They do not claim that they took issue with Mr. Jackson or denied the correctness of the statements made by him, although Mr. Jackson was only attempting to give his understanding of the situation and was endeavoring to get at the true facts for the purpose of reaching an equitable adjustment and specifically requested them to correct him if he was mistaken.

They testify that they let Jackson go on and make this statement which charged them with having made serious misrepresentations and they simply remained silent.

If they had acted honestly in their dealings with Taylor and had not been guilty of making these misrepresentations, what occasion would there be for them to enter into a secret arrangement not to discuss matters with Jackson and Taylor? Would it not be the most natural thing in the world for them to boldly assert their rights and not only correct but resent any charge of misrepresentation? Mr. Poole was a man of intelligence, an expert mining engineer, who would appreciate the seriousness and the effect of remaining silent in the face of such charge of misrepresentations, and could ill-afford to let such a charge, if false, pass unchallenged. He knew what misrepresentations of this character meant, for did he not testify that he said to Taylor:

> "Well, when I made the representation as to distance and assays and the explanations accompanying them, I told Mr. Taylor, I said, 'I will vouch for these distances because Mr. Huntington is an accurate surveyor, but I won't vouch for these estimates on here as having any meaning,' and I said, 'I want you to get that clearly in mind **because I don't want to make any misrepresentations to you.'** "

Mr. Murrish was a lawyer, presumably familiar with the legal liability which must result from making such misrepresentations, and also aware of the fact that silence in the face of charges of such a serious nature would in law be regarded as acquiescence on their part and amount to an admission by them of the truth of the charges. Under the circumstances, we submit, the testimony of these two gentlemen is beyond belief. Then there is Nenzel who says he also remained silent and who testified that when they met at a subsequent meeting that Jackson said they had admitted the truth of his statement by reason of their

silence. He did not understand Jackson's remarks because Jackson spoke in a foreign language—he used the word "acquiescence" in referring to their silence. Nenzel however possessed sufficient mental acumen, and intelligence when it came to sending out letters and telegrams to Taylor, depicting the wonderful progress in the development of the mine (see especially Plff's. Ex. 2, p. 78). In view of the numerous false and incredible statements testified to by Poole, Nenzel, Murrish and Friedman, we cannot see how any weight whatever can be given to their testimony, and we respectfully submit that the entire testimony should be discredited by the Court as being the testimony of discredited witnesses and as being incredible and untrue. As pointed out above, there is no dispute but that Taylor offered to make a loan of $75,000 and $10,000 additional for working capital. Taylor at the time was a creditor to the extent of about $70,000. Taylor offer was therefore, in effect an offer to take up two-thirds of the indebtedness of the Company, and advance an additional $10,000 for development of the mine. This constituted not only an effort on his part to adjust the matter on an equitable basis; it was in reality an offer to do more than equity required for the reason that the amount of the loan, which he was then willing to make, was more that the proportionate amount of the original loan after making due allowance or abatement for the discrepancy between the represented tonnage and the actual tonnage. Furthermore, as pointed out above, the defendants, according to their own admissions, refused to make any effort on their part to bring about an equitable adjustment of the matter, in that they made no effort whatever to induce the creditors of the company to accept the modified proposition of Taylor.

Defendant's Exhibit B undoubtedly was made up by Taylor after the calculations of the tonnage had been made from Plaintiff's Exhibit Y, showing over 60,000 tons in the mine. According to Poole it formed the basis of the negotiations which resulted in the agreement, the tonnage of 35,400 tons therein stated is the estimated amount necessary to place the proposition on a banking basis predicated upon a market of $8.00 per unit for tungsten—'the number of tons necessary to make a safe investment against the debts' (p. 575-576). Some tungsten had been sold at $9.00 per unit and the evidence shows that the market for tungsten was declining, so that $8.00 per unit could not be regarded as an unreasonable figure. While Poole, Nenzel and Murrish positively state that neither of them at any time mentioned tonnages or percentages, Poole says that Taylor did mention the tonnage set forth in Defendant's Exhibit B. Poole says it was the figment of Taylor's imagination, but Poole did not correct Taylor, although he admits that Taylor had informed him that he proposed to undertake to raise the necessary funds on a banking basis. Poole was an expert mining engineer, knew the condition of this mine, and he, Nenzel and Friedman had furnished Taylor with numerous reports of further development, whereas Taylor was not an engineer and was not familiar with matters pertaining to mine development. Then, also, Taylor stated in the prospectus (Exhibit "U" p. 923) which he got out and in various communications (Exhibits 32 p. 837) a minimum of 40,000 tons. Can it be said that such a tonnage would be unreasonable in making an allowance of 5,000 tons to cover any possibilities above what was absolutely necessary to put it on a banking basis? Now as to the representation of 60,000 tons: The Trial Court seems to place great weight on the fact that Taylor made no mention of such tonnage.

in his communications and that in his prospectus and various other communications he referred to a minimum of 40,000, 41,000 and 43,000 tons: Again we say, is it unreasonable that Taylor should adopt a conservative figure, safely above a banking basis and which would be sure to stand the test of any inspection or examination by the engineers of any parties who might consider making the loan? Taylor's representations as to a minimum of 40,000 tons was ample for the purpose; he considered it very conservative and there was no necessity for his representing any larger tonnage. Why, we ask, does Taylor charge the defendants with having represented 60,000 tonnage in sight? There can be only one answer—because it is the truth; because the calculations based on the lines and figures shown on Plaintiff's Exhibit Y show over 60,000 tons of commercial ore. Taylor relied on these representations and was induced thereby to undertake to procure the necessary loan. If Taylor had wanted to fabricate his pleadings he could easily have charged the defendants with having represented that there was more that 40;000 tons in sight so as to have it correspond with the tonnage set forth in the prospectus. He did not do this; he told the truth. Bancroft's final report is not challenged; it is admitted to be correct; and this means that the mining map, Plaintiff's Exhibit Y, produced by Poole, represents a false condition of the mine; it is fraudulent and misleading, and this is the all important piece of documentary evidence in the case from which the defendants could find no avenue of escape. This document corroborates Taylor's story. It alone is sufficient to outweigh the testimony of the defendants and render their story incredible.

Taylor further positively testifies that if the false representations had not been made he would not have entered into the contract or undertaken to secure the loan (pp. 59-60).

Poole, Nenzel and Murrish, in an effort to escape liability, have testified, as pointed out above, that the calculations were not made until the terms of the contract had been agreed upon and the formal agreement was being typewritten, and it is argued therefrom that the calculations did not constitute any inducement to Taylor entering into the contract. But Poole and Nenzel do testify that the calculations were made before the contract was finally signed. Poole (p. 497) says: "The contract was signed subsequent to the conversation." This is corroborated by Nenzel (pp. 616-617).

Now, we contend that even if this were true, it would still constitute a material inducement for his entering into the contract. Is it reasonable to suppose that Taylor would have signed the contract and given his efforts and expended his money endeavoring to secure a **loan** on a **banking basis** if he had then known that the tonnage in sight, instead of being 60,000 tons as disclosed by the mining map ,(Plaintiff's Exhibit Y) was only 18,900 tons, as shown by Bancroft's final report which was made over a month later and included all development since April 2nd, in view of the fact that it was necessary to have tonnage of 35,400 tons to put it on a banking basis according to the estimate made in Defendant's Exhibit B.

IT IS NOT A DEFENSE THAT PLAINTIFF ALSO MADE SOME OTHER EXAMINATIONS AND INQUIRIES IF THE CONDUCT OF DEFENDANTS WAS A MATERIAL, THOUGH NOT THE SOLE, INDUCEMENT TO THE TRANSACTION IN QUESTION.

In the case of **Tooker v. Alston,** 159 Fed. 599 (CCA. 8th Dist.) the Judges sitting were Sanborn, Hook and Philips. Judge Hook, writing the opinion for the Court, says:

"The Boston-Aurora Zinc Company, a Maine corporation, as the owner of 10 acres of land in southwest Missouri, executed a mining lease thereof, dated November 18, 1904, to Tooker, Loy and Reed."

In this case, representations were made as to the mine, which representations were false. Independent investigations and inquiries were made as to the mine and it was contended that the presumption of law arose that the party relied upon his own independent investigations and not upon the representations as made. These independent investigations were made before the contract was entered into. The Court says at page 603:

"The next four assignments of error relate to the refusal of the trial court to give certain instructions requested by defendants. The instruction set forth in the first of these was fully embodied in the general charge. The court was not required to repeat it, or to give it in the language of counsel. By the instruction in the next one counsel sought the declaration of a rule that if the plaintiff made an investigation himself, and consulted with others as to the condition of the mine or its value, there is a presumption of law that he acted upon information so gained, and not upon the representations of defendants. There is no such presumption of law. In Sioux Nat. Bank v. Norfolk State Bank, 5 C. C. A 448, 56 Fed. 139, this court held that it was not a defense that plaintiff also made some other examinations and inquiries, if the conduct of defendants was a material, though not the sole, inducement to the transaction in question."

We call the Court's attention also to the case of **Allen v. Pendarvis**, 159 Pac. 1117, in which the Court at page 1118 says:

"From the evidence of plaintiff it is apparent that he was actuated in the purchase of this stock by a desire to get a better position than the one he was then occupying, and from this instruction the jury was authorized to find for the defendant, if the plaintiff was induced to buy the bank stock by or through the agency of some other influence than any representa-

tions made to him by the defendant at the time of the sale. This instruction advised the jury that they must find for the defendant unless the plaintiff acted solely upon the alleged false representations made to him by the defendant. This is not the law. In an action like this, in order to entitle the plaintiff to recover, it is not necessary that the fraudulent representations complained of should be the sole consideration or inducement moving the plaintiff to make the purchase from which the injury ensued. If the representations contributed to the formation of the conclusion in his mind to buy, that is enough, although there may have been other inducements operating at the same time and aiding and leading him to that determination. A true test in such cases may be found in the inquiry whether the plaintiff would have bought the stock if the false representations had not been made. If he would, then the false representations did not contribute to the purchase; for he would have bought without them, but if he would not have bought without the representations, then they contributed to the purchase and the party making them is responsible for the damage which the plaintiff suffered, notwithstand ing that other equally powerful motives may have influenced his mind at the same time in the same direction and without the existence of which he would not have come to the conclusion to buy. If the plaintiff would not have bought the stock except for the representations alleged to have been made by the defendant, then he would be entitled to recover if such representations were in fact made, were material, and were false, even though he would not have bought the stock unless he was able to secure a position in the bank, 12 R. C. L., p. 358, 112; Tooker v. Alston, 159 Fed. 599; Dime Sav. Bank v. Fletcher, 158 Mich. 162; Buchanan v. Burnett, 102 Tex. 492; Shaw v. Stine, 21 N. Y. Super. Ct. 157."

The case of **City of Tacoma v. Tacoma Light & Water Company,** 50 Pac. 55, was one where the Tacoma Light & Water Company represented to the City, the purchaser of the water plant, that it had certain conduits and sources of water supply of a certain capacity and flow; the City of Tacoma employed an engineer who made an examination;

it was a partial examination; it was not a thorough examination. The Court held that even a partial examination does not bar an action for deceit for false representation, if the false representation was a material inducement to the entering into the contract in question.

It appears from the testimony that Poole was an expert mining engineer; that he had been connected with a number of mines of this character; had had a great deal of experience in the develpment of same; that he thoroughly understood the development of mines of this character, and knew the development and value of this particular mine so much so that Taylor proposed to make him superintendent. It also appears, on the other hand, that Taylor was inexperienced in mining matters; that outside of some business he had transacted in connection with the sale of ores, he had no knowledge regarding mines. Taylor testified that he relied upon the representations as to the condition of development of this mine made to him by the defendants, and that if he had known that the representations were false he would not have executed the contract of April 2nd, nor entered upon the performance thereof. An attempt was made all through the case by the defendants to show that the plaintiff did not rely upon any representations made to him by the defendants; that he was relying upon Bancroft and such examinations as he had personally made himself, and that, therefore, he was not induced to execute or enter upon the performance of said contract by reason of any representations made by the defendants to him. We contend that it does not make any difference whether mentally or otherwise Taylor determined upon a further examination by Bancroft and that he did not have to continue to rely solely upon the representations which had theretofore been made to him. The fact that a person has an independent investigation made does not give rise to any presumption of law that he relied upon that investigation and

not upon the representations. The law is well settled to the contrary.

On these questions we call the Court's attention also to the following cases:

Schoefield Co. v. Schoefield, 40 Atl., 1046;
Safford v. Grout, 120 Mass., 20;
Shaw v. Gilbert, 111 Wis., 165;
Lewers v. Crandall, 7 Mo. App. 564;
Sioux Bank v. Norfolk Bank, 56 Fed. 139;
Kraus v. Bank, 167 N. W. 352;
Schmidt v. Thompson, 167 N. W. 543;
Prescott v. Brown, 120 Pac. 991-994.
Green v. Turner, 80 Fed. 4186 Fed. 837.

It will be noted from the foregoing cases that the representations need not be the sole inducement and there is no presumption of law arising from an independent examination that he did not rely on the representations. Taylor continued to endeavor to interest capital in New York in the enterprise. He employed Mr. Jackson to act as attorney to complete the deal. He had Mr. Bancroft make another examination, and, we submit, that that in itself is a reliance upon the statements and representations theretofore made. He paid Mr. Bancroft a fee for it and paid his expenses. According to the testimony, he left New York about the 20th of May for the purpose of coming West to complete the transaction; he had not had any success in New York in getting subscribers to the loan,—actual bona fide subscribers, but while in New York, still relying upon the representations which were made, commencing on the 14th and continuing up to the 21st of May, he sold stock upon the Stock Exchange in the sum of $57,000, taking a loss upon that of something over $4000. Before he left New York he arranged with the New York Trust company for a $40,000 loan secured by concentrates. He came West, met Mr. F. M. Taylor and Mr. Brown, and he actually received from Mr. F. M. Taylor his check for $25,000 for the consummation of the deal; he wrote to the

defendants and stated that he was going through with the transaction; that he and Thane, together with his father and Brown, would have the money ready to complete the transaction. Taylor wired from New York and had Bayless go up and make an examination of the records of the corporation and the title of the company, paying his expenses and obligated himself for Mr. Bayless' fees. He continued in fact, and by act, and by expenditure of time and money, at all times after the 1st of May and after the 14th of May to actually and truly rely upon the representations which had theretofore been made to him; and he never failed to rely upon them until he received Bancroft's last report.

TAYLOR ENTITLED TO COMPENSATION UNDER CONTRACT, HAVING PERFORMED ON HIS PART AND THE TRANSACTION HAVING FALLEN THROUGH BY REASON OF MISREPRESENTATION OF DEFENDANTS

It is our contention that in this case Mr. Taylor fully performed the terms of the contract on his part; that he procured the money necessary to be paid over and was ready, willing and able to pay over the same when it was discovered that the representations which had been made to him by the defendants as to the condition of the development of the mine were false—when Bancroft's final report disclosed the fact that instead of a tonnage of 60,000 tons, as represented, there was a tonnage of less than 20,000 tons. The law is well settled that where a person, acting in the capacity that Taylor was, obtains the money necessary to complete a loan which he was commissioned to get and brings the people together ready to deal and the transaction falls through by reason of false representations or misrepresentations, that he has earned his compensation. The Court's attention is called to the case of **Dotson v. Milliken,** 52 L. Ed. 768; 209 U. S. 237, which was

very much like this case, except that in that case the party was employed to effect a sale, whereas in this case Taylor was to procure a loan. In this case the Court said:

> "This is an action for a commission of $2.50 an acre on 10,000 acres of coal land belonging to the defendant, the plaintiff in error, for which, although not sold, the defendant in error, the plaintiff, says that he furnished a purchaser, satisfying the terms of the understanding on which he was employed. The errors alleged and now insisted upon are the giving of an instruction requested by the plaintiff and refusing one asked by the defendant."

Relations between the parties were opened by letter, resulting in the employment of the plaintiff. Representations were made that a railway company was willing to build a railroad into the said property, etc. Relying upon these representations, a purchaser was found who was able, ready and willing to purchase the land, provided the representations were correct. The sale failed because of the inaccuracy of the defendant's representations, which were discovered when the deal was about to be consummated. The Court at page 240 says:

> "The foregoing letters show that the plaintiff was employed and went to work. He spent a good deal of time and money in his efforts, as the defendant knew. There is no reasonable doubt as to the rate at which he was to be paid, and the substantial question is what he had to do to entitle himself to his compensation. The bargain made may have been improvident and may have been different from that which the defendant would have made if he had taken all the chances into account. But the general question is what the jury was warranted in finding to have been made in fact. It was recognized that what the railroads would do was decisive, and it was to be expected that parties thinking of a purchase would require an assurance from them, or something more definite than what the defendant had said. * * * * * The jury was warranted in finding that the plaintiff was employed at the rate named to make a bargain for land to be identified later and subject to requirement of the pur-

chaser that the railroads or one of them would agree to build a road into the land.

The ruling requested for the plaintiff was as follows:

'If the jury believe from the evidence that the defendant, on or about the 30th day of April, 1902, represented to the plaintiff that he, the defendant, was desirous of securing a purchaser for either the whole or any considerable quantity of the Harlan County coal lands at the price of $20.00 per acre, that he had obtained from the Southern Railway Company its consent or agreement to construct a branch railroad into the said coal lands, and that he would pay to the plaintiff the sum of $2.50 for each and every acre for which he should find a purchaser at and for the price of $20.00 per acre, and that shortly thereafter, namely, on or about the 8th of May, 1902, he further represented to the plaintiff that the Southern Railway Company was willing to build the said railroad into the said property without placing any requirements on the purchasers or holders of said lands to put in any certain size of plants or number of coke ovens, and that the plaintiff, relying upon the said representations of the defendant, expended time and effort in the attempt to find a purchaser, and did find a purchaser able, ready and willing to purchase ten thousand acres of the said lands at the said price provided the defendant's said representations were correct, and that the said sale failed because of the inaccuracy of the defendant's representations that the said Railway Company had so consented or agreed to construct a branch railroad into the said coal lands, then the plaintiff is entitled to recover the said stipulated sum of $2.50 per acre on the ten thousand acres, or $25,000 in all.'

This was given, and the defendant took a general exception.

It is objected to this ruling that the jury was not required to find and could not have found that any particular land was agreed upon. But it at least would have been warranted in finding that the plaintiff had done in this respect all that his bargain required him to do. The agreement failed for a wholly different reason, and no difficulty in completing the sale arose on that ground. We are of opinion that the objection

is entitled to no consideration, especially upon a mere general exception and upon a point not taken in the trial court. **McDermott v. Severe,** 202 U. S. 600, 611."

The Court further says on page 243:

"The ruling requested for the defendant was as follows:

'If the jury believe from the evidence that any bona fide purchaser was actually found by the plaintiff for 10,000 acres of said land as claimed in the declaration, upon the representations of said plaintiff to said purchaser as to the existence of a certain agreement between the defendant and the Southern Railway Company concerning the construction of a branch railroad into said lands and the purchaser did not rely on the said statements and representations of said plaintiff, but with the knowledge or cooperation of said plaintiff and at his suggestion sought and undertook to verify the truth of such statements and representations during the pendency of the negotiations for the purchase of said land before any transaction was closed for the purchase thereof, and that said purchaser had the opportunity of investigating, ascertaining and verifying the truthfulness of such statements and representations, and took advantage of that opportunity by interviews, conferences or written communications, either personally or by attorney, or by others, with the president and first vice-president of the Southern Railway Company, for the purpose of verifying the said statements and representations so made by the plaintiff as to any agreement existing between the defendant and Southern Railway Company in regard to the construction of the said branch railroad, and ascertained from the said officers of the said Railway Company, from time to time during said negotiations and before September 15, 1902, the date upon which it is alleged in the declaration that said purchaser was found, that no agreement existed between the defendant and said Southern Railway Company to build said branch railroad, but that the subject of building such branch railroad had only been discussed, and that the building thereof depended on the development and improvements to be placed on said land prior to the construction of any railroad, in the way of opening coal mines, establishing coke ovens,

or furnishing the railroad with a sufficient amount of tonnage, and that said plaintiff and alleged purchaser had full knowledge and information from the proper officers of the Southern Railway Company of all the facts relating to the conditions upon which said branch railroad would be constructed and of the non-existence of any agreement between the defendant and Southern Railway as alleged, then the defendant is not responsible for the non-appearance of the alleged sale or purchase of the land between the plaintiff and the alleged purchaser, and you should find for the defendant.'

As to this request we must repeat that it does not matter how much or how little the purchaser relied upon the defendant's representations if the plaintiff relied upon them and obtained a purchaser ready and able to purchase upon the basis that the defendant's representations to the plaintiff were true. That the plaintiff did rely upon them until the time when, on August 25, he announced Easter's readiness to purchase, hardly is open to dispute."

In **Spiers & Bevan v. Gluck,** 17 The Times Law Reports, p. 236, the Court says in its opinion at p. 237:

"Where an agent was employed, either to sell a house or to find a partner, on commission, and his employer made a statement to him which was to be the basis on which the agent was to go to work, if it turned out that that statement, though honestly made, was inaccurate, which inaccuracy caused a person to withdraw who otherwise would have been willing to buy the house or enter into the partnership, then the agent was entitled to claim his commission."

In **Green v. Lucas,** 33 The Law Times (N. S.) 584, the head note is as follows:

"Where an agent employed to borrow money upon lease-hold security finds a person able and willing to lend, but the negotiations go off by reason of such person discovering unusual covenants which the agent was not informed of, the agent is entitled to the whole of the agreed commission for procuring the loan.

The defendant agreed to pay the plaintiffs a com-

mission of two per cent 'for procuring him on loan the sum of £20,000 upon the security of certain leasehold property at Southwark' having three days before such agreement furnished the plaintiff with two valuations of the property, each of them stating the lease to be for a term of ninety-nine years, and setting the value at about £37,000, and one of them assuming that the lease 'contained no arbitrary or restrictive clauses but only the usual covenants.' Upon the strength of these valuations the plaintiffs applied for a loan to a provident institution, the directors of which agreed to advance it 'subject to the title and all other questions proving to be satisfactory.' Upon examination of the lease on behalf of the institution, it was discovered that the lease, instead of being a lease for ninety-nine years absolutely, contained a proviso for re-entry under certain conditions which constituted a substantial deterioration of its value, whereupon the directors refused to make the advance.

Held: (affirming the judgment of the Common Pleas) that the plaintiffs were entitled to the whole of the agreed commission."

In this case, Bromwell, B.—in his opinion says:

"I have but one little matter to add. I am of opinion that the word 'procure' in this contract, means to procure the lender and not the money, and that the contract was completed, as far as the plaintiffs were concerned, when they had procured a person who was ready and willing to advance the money."

Blackburn, J.—says in his opinion in this case:

"I am of the same opinion. The agent stipulates for a certain commission on what he can get, and says, if I succeed in getting a larger sum I am entitled to more commission. It might be prudent, in transactions of this kind, to introduce into the contract a clause such as 'If this goes off without fraud on my part, you are not entitled to your commissions,' though I do not know that the agent would consent to such a condition; but in the present case 'procure' means procure a person who is ready and willing to lend the money on the leaseholds. What that leasehold was must be seen by investigation of the title. The company agreed to advance the money, subject to the title; the agent had substantially succeeded in procuring the loan and it only failed through failure of the security."

On this question see also:

Glentworth v. Luther, 21 Barb. 145
Hugill v. Weekley, 15, L. R. A. 1262
Little v. Liggett, 121 Pac. 1125;
Hannan v. Moran, 38 N. W. 909;
Cohen v. Farley, 58 N. Y. Supp. 1102;
Goodman v. Hess, 107 N. Y. Supp. 112;
Roberts v. Kimmon, 3 So. 736
David v. Lawrence, 34 Pac. 1051;
Smye v. Groesbeck, 73 S. W. 972;
Conkling v. Crakaur, 11 S. W. 117;
Fullerton v. Carpenter, 71 S. W. 98;
Sullivan v. Hampton, 32 S. W. 325;
19 Cyc. 268, 269, 278;
4 R. C. L., Sec. 49, p. 309;
Lewis v. Mansfield, 121 S. W. 585.

Attention is called to **Hugill v. Weekley,** 15 L. R. A. (N. S.) at p. 1262, particularly with reference to the note. The syllabus reads as follows:

"The contract of real estate brokers provided that they were 'to make all the effort possible to make sale of the property, for which they are to receive 5 per cent commission for their services out of the first payment.' They procured a purchaser who was accepted and entered into a contract of sale and purchase with their principals at a stipulated price, to be paid in full at a stipulated time on delivery of deed. Held, that the brokers were entitled to recover the commissions according to the contract, notwithstanding the purchaser, because of alleged misrepresentation by the seller's employee, refused to complete the contract, or to pay any part of the purchase money.

When a real estate broker had done all required of him by his contract, unless limited by express provisions thereof, he is entitled to the compensation provided for therein.

Where a brokerage contract makes an actual sale a condition precedent to the right of a broker to demand compensation, if the principal and the customer found by the broker enter into a valid contract of sale, and the broker acts in good faith, the latter is not deprived of his right to a commission by the fact that the customer fails to carry out the contract.

> Having performed his contract, a broker cannot be deprived of his commission, though for some reason not involving culpability on his part, but due to the misrepresentations of the seller, the contract of sale fails of execution."

And in connection with that we would like to call the Court's attention particularly to the wording of the contract of April 2nd (Plff's. Ex. C), which reads as follows:

> "The first party undertakes **to secure by borrowing** for the Nevada Humboldt Tungsten Mines Company, and its allied companies, a sum sufficient to liquidate the indebtedness of the Nevada Humboldt Tungsten Mines Company, the Tungsten Products Company, and the proportion of the indebtedness of the Mill City Development Company which the second parties owe, said indebtedness estimated to be the sum of $220,000, on or before June 16, 1919.
>
> 2. When or if the said first party shall secure the said sum sufficient to liquidate the entire indebtedness, as above provided, then and in such event the second parties promise, covenant and agree to transfer and deliver to the first party in full payment for services rendered in securing such sum of money, 62 per cent of the issued capital stock of"

these various companies. Now there is no place for that deposit to be made under the contract, but the contract does say,

> "that a deposit of the amount necessary to liquidate the indebtedness as herein provided, in the Wells Fargo Nevada National Bank, shall be sufficient evidence of the performance of the conditions herein for the transfer and delivery of the stock as herein provided."

It is our contention that under the provisions of the contract, and under the facts, Mr. Taylor did actually provide for the loan in accordance with the terms of the contract; and the only reason the transaction fell down was due to the misrepresentations of the defendants as to the amount of ore in sight in the mine.

Under the circumstances it was not necessary that a tender should be made.

9 Corpus Juris 624.

THE COURT HAS EQUITY JURISDICTION — SPECIFIC PERFORMANCE—PROPER REMEDY

It will be noted that the compensation which Taylor was to receive for his services under the contract of April 2nd consisted of 62 per cent of the stock of the Tungsten Company, 62 per cent of the stock of the Products Company, and 62 per cent of one-half of the stock of the Development Company. It will also be noted that practically all of the stock of these companies was owned and controlled by the defendants; that by reason of such ownership and control held by the defendants, it would necessarily follow that the stocks would have no market value; that by reason of their being mining stocks their value would necessarily be uncertain and subject to fluctuation; that the 62 per cent of the stock of these companies, which was practically all held by the defendants, could not be procured in the open market and in fact could not be procured from any other source than from the defendants; that the 62 per cent of the stock of these companies constituted a majority of the issued and outstanding stock and carried with it control of the companies and, therefore, this stock which Taylor was to receive possessed a special value by reason thereof which could not be measured in dollars and cents—so that, under the circumstances, the only place where Taylor could secure adequate relief is in a Court of Equity and the only remedy which would afford such adequate relief would be a decree of specific performance, compelling the delivery of the specific stock to which Taylor became entitled as his compensation by reason of his performance of the contract.

On the question of equity jurisdiction in this case and the propriety of the relief sought, we refer the Court to **Turley v. Thomas**, 31 Nev. 181, and particularly to page

195, where the Court quotes with approval the case of **Duff v. Fisher,** 15 Cal. 375, as follows:

> " 'The jurisdiction of a court of equity to decree specific performance does not turn at all upon the question whether the contract relates to real or personal property, but altogether upon the question whether the breach complained of can be adequately compensated in damages. If it can, the plaintiff's remedy is at law only; if not, he may go into a court of equity, which will grant full redress by compelling specific performance upon the part of the defendant.'
>
> From the authorities where the question of specific performance of an agreement for the sale of mining stock was under consideration by the courts, it appears to have been held that owing to the fluctuating and uncertain value of mining stocks it was often difficult to substantiate by competent evidence the market value thereof, and, owing to the risk of personal responsibility of individuals and corporations, that the courts should be liberal in extending full, adequate, and complete relief by decree of specific performance; the courts holding that there is a wide distinction between the shares of stock of a mining company, and public stocks which have been placed for sale upon stock boards, and are a subject of everyday sale in the financial markets of the country."

We also on this question call the Court's attention to the text and cases cited on this question in 36 Cyc. 560:

> "4. **Shares of Stock—**
>
> (a) **Stock Readily Procured in Market.**—By the rule in this country, specific performance will not be decreed if the stock is one which is the subject of every-day sale in the market, so that its value can be readily and certainly ascertained.
>
> (b) **Stock Having No Market Value and Not Readily Procurable.**—When, however, this is not the case, where the stock has no market value and cannot be readily obtained, except from a party to the contract, by the prevailing rule in this country specific performance may be had.
>
> (c) **More Stringent Rule in Some States.**—In a number of jurisdictions, a more stringent rule has been announced; and it is held that plaintiff must show some

special circumstances rendering the legal remedy inadequate, over and above the mere fact that the stock has no quotable commercial value and is seldom for sale in the market, as that the stock is of peculiar value to him, or that he needs it in specie, or that its value cannot be estimated in damages.

(d) **Plaintiff Desiring Control of Corporation.**—Where the contract calls for the transfer of sufficient stock to make plaintiff the owner of one-half of the entire stock, so that its chief value to him is the power and influence given in the management of the corporation, this, in connection with the uncertain value of the stock, is a sufficient ground for specific performance."

36 Cyc. 561 (Note)

"**Mining Stock.**—Stocks of mining corporations in the Western states are as a class a fit subject-matter for specific performance, owing to their great fluctuations in value, the difficulty of substantiating that value by competent evidence, etc. (Treasurer v. Commercial Coal Mining Company, 23 Cal., 390; Frue v. Houghton, 6 Colo. 318; Rau v. Seidenberg, 53 Misc. (N. Y.) 386; see also Johnson v. Brooks, 93 N. Y. 337)."

"The contract will be enforced where there is none of the stock on the market and no available way of proving the value of the stock or the amount of damages from the breach of contract. (Dennison v. Keasby, 200 Mo. 408); or where the stock has no quoted value or any definite market price or any certain value capable of exact ascertainment and cannot be obtained except from defendant. (Butler v. Wright, 186 N. Y. 259)."

In this case the complaint alleges that the stock has no market value and that its value in damages cannot be ascertained with any degree of certainty under paragraph 10 of the complaint; that paragraph, so far as all the defendants (except Loring) are concerned, stands admitted and undenied.

We have, however, placed ourselves in two positions on this matter. While it is our contention that Taylor fully earned his commission and became entitled to receive from the defendants the full amount of the stock which they

agreed to deliver to him under the contract as his compensation and that he was not required to do anything further to entitle him to that compensation, inasmuch as he had procured the necessary funds and the deal had fallen through by reason of misrepresentations of the defendant, the complaint goes further and alleges that Taylor, after the falsity of the representations had been discovered, offered to enter into a new arrangement based upon a fair and equitable abatement of the amount of the loan which would be proportionate to the disclosed value of the mine as compared with the represented value thereof. The testimony shows and is not disputed that at the meeting in California Taylor offered to make a loan of $75,000 to be applied toward the payment of the debts of the company, and $10,000 additional to be used as operating capital. The allegations and prayer in the complaint call for this alternative equitable relief which would also involve the specific performances of the contract and by reason whereof, we submit, that the plaintiff sought the relief to which he is entitled in the proper Tribunal.

Upon the question as to the right of an abatement, we call the Court's attention to:

Walling v. Kinard, 10 Tex. 508; 60 Am. Dec. 216;
Harbers v. Gadsden, 62 Am. Dec. 390;
Hanks v. Kehoe, 10 L. R. A. (N. S.) 125;
Epstein v. Kuhn, 80 N. E. 80;
Melin v. Wooley, 115 N. W. 654; 22 L. R. A. (N. S.) 595;
Sanborn v. Nockin, 20 Minn. 178;
Keator v. Brown, 57 N. J. Eq. 600;
Mitchell v. Zimmerman, 51 Am. Dec. 717.

In **Mitchell v. Zimmerman,** there was an examination made by the vendee. The court held in that case that the vendor, under the circumstances, was in a better position to know the exact quantity of the land, and in the absence of suspicious circumstances, the vendee was entitled to rely on the vendor's representations.

These are also cases which, in our opinion, are analagous:

Pruett v. Jones, 36 S. W. 502;
Merrit v. Taylor, 10 S. W. 532;
Meyers v. Estell, 47 Miss. 421.
Estell v. Meyers, 54 Miss. 174; 56 Miss. 800;
Mellick v. Cross, 62 N. J. Eq. 545;
Straus v. Norris, 77 N. J. Eq. 33.

The case of **Smith v. Werkheiser,** 115 N. W. 964, while not exactly upon the same question, is in principle absolutely in point. It was a case in which the vendor sold a newspaper. He represented that it had certain advertising and certain circulation. The purchaser paid a part of the purchase price, after making a partial examination, and gave a mortgage for the balance—note and mortgage. The vendee discovered the falsity of the representations after he had gone into possession of the property, and when the note and mortgage were presented for payment, he declined to pay, and asked for compensation on the mortgage for the amount of the deficiencies. The vendor refused, and threatened to commence an action for the foreclosure of the mortgage. An action was then brought by the vendee, the purchaser, in equity, enjoining the foreclosure of the mortgage, and asking for an abatement of the original purchase price and contract price, in an amount equal to the deficiencies on account of the representations, which was granted.

LORING HAD NOTICE OF TAYLOR'S RIGHTS

Coming now to some questions of fact which deal with Mr. Loring's connection with the property. The question is whether or not Mr. Loring was placed upon notice of Mr. Taylor's rights. Mr. Loring himself testified that in New York Mr. Taylor told him that he was going to take the mine from the boys (p. 714). That was long before—a

month or more before—he had any transactions or dealings concerning the property. On August 9th Mr. Taylor wired Mr. Loring (p. 834) stating he had heard that he had an option on the properties and asking whether it was true; and also stated that he was advised by his attorneys that he had a good cause of action to compel them to deliver 62 per cent of the stock, or, in the alternative, suit for heavy damages. Now in connection with that, counsel set up an estoppel, that our election to proceed for damages, and the filing of the damage suit, was such an election as would justify Mr. Loring in going on. But from an examination of the testimony in this case the Court will see that Mr. Taylor sent that telegram on the 9th of August, 1920. On the 10th or 11th, Mr. Loring wired back (pp. 698-835): "Yes, I hold option on properties." Mr. Loring did not hold the option on those properties at that time (p. 699). Mr. Loring did not hold those options until a contract was made by him on the 16th of August; and when Mr. Loring entered into that contract on the 16th of August, he had additional notice that Mr. Taylor was going to take some further action, because of Mr. Taylor's protest on file—not on the 16th, but on the 23rd. The meeting held on the 16th was a directors' meeting, and that meeting outlined the contracts, subject to the approval of the stockholders' meeting to be held on the 23rd. On the 23rd, when Mr. Loring formally executed the contract and accepted it, there was before the very identical meeting, and the minutes so show, the protest of Mr. Taylor against the sale, contending that an inadequate notice of the meeting had been given. Mr. Loring therefore was on notice in June; he was on notice on the 9th of August, or as soon as he received the telegram, and he continued to be upon notice to the 23rd. Mr. Loring did not advance any money under the terms of this contract, before he had any notice. The moneys that Mr. Loring advanced, some $17,000, were for the purchase by him of the claims of the Rochester Combination and the

Rochester Mines Company; an actual out and out purchase a loan and purchase of those claims, which he could enforce against the company if he so desired. They were afterward applied on the first payment of the purchase price of the property, but they were no part of the original transaction. Those assignments were taken by him on the 16th, before the contract had been approved by the stockholders, and he stood then in the position of being nothing more or less than an assignee of those particular claims; and he didn't pay any part of the purchase price until after he knew, on the 23rd, that Taylor was going to proceed and had made protest against the contract for the sale of all of the assets of the corporation. We say all of the assets of the corporation, because the notice which Mr. Taylor received said, "We will sell all of the assets of the corporation." The testimony in the record is that they did sell all of the assets of the corporation, except their corporate books, seal, and some stores and supplies, which were in the warehouse or storehouse; they sold substantially and practically every asset that they had, and no value was shown for those things they retained.

The meeting of the directors was held on the 16th of August, the stockholders' meeting was held on the 23rd; seven days intervened. The notice which was mailed to Mr. Taylor did not even give one week's notice, because it wasn't deposited in the post office, according to the cancellation mark on the envelope, until the 18th.

Now those are the facts, as we view them, with reference to Mr. Loring's connection with the transaction. Mr. Loring did not have an option, although he wired Taylor that he did (p. 699). Mr. Taylor proceeded to file his complaint afterward upon the strength of the statement, "I have an option." Mr. Loring had every opportunity after the receipt of Mr. Taylor's telegram, up to the 16th to act, up to the 23rd to withdraw, because it had not been rati-

fied, and with full notice that an attack would be made upon the sale of the corporate assets to Mr. Loring, under the terms as provided in that contract. It was an option only—Loring was under no **obligation** to buy. If he did so after notice it was at his peril.

ACTION AT LAW FOR DAMAGES IS NOT A BAR TO ACTION FOR SPECIFIC PERFORMANCE OF THE SAME CONTRACT.

Tobin v. Larkin, 183 Mass. 389.
Connihan v. Thompson, 111 Mass. 270.

Respectfully submitted,

GEORGE B. THATCHER,
WILLIAM WOODBURN,
JOHN G. JACKSON,
Attorneys for Appellant.